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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. .

McCLOSKEY & CO., INC. AND McCORMICK TAYLOR ASSOCIATES,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered on May 13, 1971.

OPINIONS BELOW.

The opinion of the Court of Common Pleas of Philadelphia County is unreported, but is printed in the Appendix hereto at p. 13. The opinion of the Superior Court of Pennsylvania is reported at 217 Pa. Super. 791, 269 A. 2d 146 (1970), and is printed in the Appendix hereto at p. 43. The opinion of the Supreme Court of Pennsylvania is reported at 443 Pa. 177, 277 A. 2d 764 (1971), and is printed in the Appendix hereto at p. 44.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on May 13, 1971 and is printed in the Appendix hereto at p. 76. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

QUESTION PRESENTED.

Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, may defendants in a Pennsylvania criminal case be deprived of the right to a preliminary hearing guaranteed other accuseds in that state merely because their prosecution was recommended by an investigating grand jury?

CONSTITUTIONAL PROVISION AND RULE INVOLVED.

The Fourteenth Amendment to the United States Constitution provides, in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 119,[1] Pennsylvania Rules of Criminal Procedure, 19 P. S. Appendix provides:

> "Rule 119. Rights of parties at Preliminary Hearing
>
> (a) The attorney for the Commonwealth may appear at a preliminary hearing and:
>
> (1) Assume charge of the prosecution; and
>
> (2) Recommend to the issuing authority that the defendant be discharged or bound over to court according to law.
>
> (b) The defendant shall be present at a preliminary hearing, except as provided in these rules, and may, if he desires:
>
> (1) Be represented by counsel to act in his behalf;
>
> (2) Cross-examine witnesses and inspect physical evidence offered against him;
>
> (3) Testify, call witnesses other than witnesses to his good reputation only, and offer other evi-

1. Throughout this petition, the rules cited are those in effect at the time defendants were indicted. Pursuant to the Pennsylvania Supreme Court Order of January 13, 1970, No. 66 Criminal Procedural Rules, Docket No. 1, new rules were adopted and promulgated, which went into effect as of May 1, 1970. However, the new rules do not alter the former requirement of a preliminary hearing, and the rights of a defendant at the preliminary hearing remain the same. Rule 119 is now Rule 120.

dence in his own behalf, except where the offense charged is murder, voluntary manslaughter, kidnapping, arson, robbery or burglary; and

(4) Make written notes of the proceedings, or have his counsel do so, or have at his own expense a stenographer present to make a record of the proceedings.

(c) If a prima facie case of the defendant's guilt is not established at the preliminary hearing, and no application for continuance, supported by reasonable grounds, is made by an interested person, and no reason for a continuance otherwise appears, the issuing authority shall discharge the defendant. No further proceedings may be had before any issuing authority on the same cause until the complainant in the original action has repaid the costs to the person or entity charged therewith. When a defendant has been discharged as herein provided and is thereafter arrested or summoned before an issuing authority upon the same cause without the repayment of costs by the original complainant, a judge of a court may, in his discretion, upon application of the defendant and upon being satisfied that the subsequent action is substantially the identical cause involved in the first action, by whatever name it may be called, quash the proceedings and discharge the defendant from custody or the obligation of his bond without costs, or he may permit the prosecution to continue.

(d) A defendant, charged with a capital offense, shall have the right to have counsel assigned to represent him at the preliminary hearing. Adopted June 30, 1964. Eff. Jan. 1, 1965."

STATEMENT.

On March 30, 1969 the District Attorney of Philadelphia filed a petition to convene an investigating grand jury alleging a breakdown of usual law enforcement in connection with alleged wrongdoing involving Philadelphia's urban renewal programs, Housing and Redevelopment Authorities, and Department of Licenses and Inspections. The Court of Common Pleas of Philadelphia granted this petition and specially charged the regular grand jury of April Term, 1969 with the investigating function.

On September 3, 1969 the investigating grand jury returned its Fourth Presentment recommending the indictment of the petitioners and others on charges of conspiracy and false pretenses in connection with the construction of Philadelphia's new sports stadium. The judge in charge of the investigating grand jury accepted the presentment and authorized the District Attorney to submit its recommendations directly to the next indicting grand jury without first affording to the accuseds the customary right to a preliminary hearing which Pennsylvania law provides. Upon the return of indictments petitioners filed several pretrial motions challenging their validity. On July 27, 1970 the Court of Common Pleas of Philadelphia County (Spaeth, J.) granted petitioners' motion to quash the indictments on the ground that they had been deprived of the preliminary hearing to which they were entitled under the Pennsylvania Rules of Criminal Procedure.

By so construing the rules Judge Spaeth specifically noted that he was thereby able to avoid the "serious constitutional question" of equal protection which would be presented if he were to interpret the rules as the Commonwealth contended, to require a preliminary hearing in most cases, but not where there had been an investigating grand jury's presentment. (Appendix p. 39.)

In considering the issue, however, Judge Spaeth said the problem would be to determine what might be the purpose of classifying criminal prosecutions in such a way that sometimes the accused would be entitled to a preliminary hearing and sometimes he would not, particularly when this would mean that those who did not receive a preliminary hearing would be deprived of many significant opportunities that those who did receive a preliminary hearing would enjoy: the opportunity to "expose fatal weakness in the State's case"; to "fashion a vital impeachment tool", to "preserve testimony favorable to the accused"; and to "discover the case the State has . . . and make possible the preparation of a proper defense." (Appendix p. 38.) Judge Spaeth then said: "In determining the possible purpose of a classification, the Courts have developed various tests. *See:* Note, *Developments in the Law—Equal Protection,* 82 Harv. L. R. 1065, 1077 *et seq.* (1969). Without stating these tests, it would seem that under any of them the classifications that would result from accepting the Commonwealth's view of the rules would be invalid as arbitrary and unrelated to the achievement of any rational purpose." (Appendix p. 38.)

The Commonwealth appealed to the Superior Court of Pennsylvania which affirmed without opinion by an equally divided court on September 25, 1970. (Appendix p. 43.) The Commonwealth next appealed to the Supreme Court of Pennsylvania which reversed and held that the Pennsylvania Rules of Criminal Procedure which provide the right to a preliminary hearing were not meant to apply where an investigating grand jury had recommended the prosecution of the accused. (Appendix pp. 44, et seq.) The court met the equal protection issue by holding that an investigating grand jury's presentment was a constitutionally permissible and reasonable alternative to a preliminary hearing. (Appendix p. 67.)

This petition followed.

REASONS FOR GRANTING THE WRIT.

The Pennsylvania Supreme Court has decided a serious constitutional question of equal protection of law in a way not in accord with applicable decisions of this Court. In summary, the Supreme Court of Pennsylvania held that while normal Pennsylvania criminal procedure *requires* that an accused be afforded a preliminary hearing before presentation of his case to an indicting grand jury, such a hearing need not be granted where accused's prosecution was recommended by an investigating grand jury. In the latter situation the district attorney was authorized to secure an indictment by presenting the recommendations of the investigating grand jury directly to the next indicting grand jury, and thereby to circumvent the important rights which a preliminary hearing would afford the accused.

Every lawyer with experience in the defense of criminal cases knows the value of a preliminary hearing to protect the interest of his client. While this Court has yet to hold that a preliminary hearing is constitutionally required, it did very recently rule that if a preliminary hearing is conducted, it is a "critical stage" at which the accused must be as fully represented as at trial. *Coleman v. Alabama,* 399 U. S. 1 (1970). In *Coleman* the defendants had been convicted of assault with intent to murder. Under Alabama law the preliminary hearing is not even a required step. The prosecutor there may seek an indictment directly from the grand jury without a preliminary hearing. Moreover, under Alabama law the sole purpose of a preliminary hearing is to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury. Also, if the accused is not represented at the preliminary hearing by counsel, nothing occurring at the hearing can be used to the prejudice of the accused at trial. The *Coleman* defendants did have a preliminary hear-

ing; they were not represented by counsel, and the State was not permitted to use against them at trial anything that occurred at the preliminary hearing. They contended nevertheless that the Alabama preliminary hearing was a "critical stage" of the proceeding at which they were entitled to counsel. This Court agreed, saying:

> "The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends, as noted, upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.' *United States v. Wade, supra.* [388 U. S. 218 (1966)], at 227. Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.
>
> "The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary

> hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid [of counsel] . . . as at the trial itself.' *Powell v. Alabama, supra.* [287 U. S. 45 (1932)], at 57." 399 U. S. at 9.

The opinion of the court was by Mr. Justice Brennan, and Part II of the opinion, a portion of which has just been quoted, was joined by Mr. Justice Douglas, Mr. Justice White and Mr. Justice Marshall. In a separate concurring opinion Mr. Justice Black agreed that the considerations outlined above by Mr. Justice Brennan were more than sufficient to compel the conclusion that the preliminary hearing is a "critical stage" of the proceeding. Mr. Justice Harlan also thought that the United States Constitution required Alabama to provide counsel at a preliminary hearing. Mr. Chief Justice Burger and Mr. Justice Stewart dissented. Mr. Justice Blackmun did not sit.

So far as is here pertinent, the significance of *Coleman* lies only in its recognition that where available, a preliminary hearing is a critical event in the progress of a case, and that those who receive one enjoy substantial rights to "expose fatal weakness in the State's case"; to "fashion a vital impeachment tool"; to "preserve testimony favorable to the accused"; and to "discover the case the State has . . . and make possible the preparation of a proper defense."

This aspect of *Coleman* is not new for Pennsylvania. Under Pennsylvania Rules of Criminal Procedure (as contrasted to Alabama practice) a defendant has a right to a preliminary hearing. *Pennsylvania Rules of Criminal Procedure,* 116, 117, 118, 119. 19 P. S. Appendix. Moreover, the Pennsylvania Rules have long spelled out the rights of a defendant at a preliminary hearing in much the same language as later used in *Coleman* by Mr. Justice Brennan.

Thus, Rule 119 provides that at a preliminary hearing the defendant:

1) May be represented by counsel to act in his behalf;

2) May cross-examine witnesses and inspect physical evidence offered against him;

3) May testify, call witnesses and offer evidence except where certain offenses not present here are charged;

4) May make a stenographic record of the proceeding;

5) Shall be discharged if a prima facie case of the defendant's guilt is not established.

Perhaps the Pennsylvania Rules of Criminal Procedure need not have provided all of these rights. However, once having done so, the State may not carve out a small group from the class of all accuseds in Pennsylvania and declare them ineligible to enjoy the same rights as the others unless there is good reason for treating them differently. *Commonwealth v. Littlejohn,* 433 Pa. 336, 345-346 (1969); *Douglas v. California,* 372 U. S. 353 (1963); *Griffin v. Illinois,* 351 U. S. 12 (1956). "The right to a preliminary hearing . . . only becomes a Federal constitutional guarantee by the equal protection clause of the Fourteenth Amendment because it is a part of the due process of the state," which must be afforded equally to all defendants. *Silva v. Cox,* 351 F. 2d 61, 64 (10th Cir. 1965); *Guerra v. Rodriguez,* 372 F. 2d 472, 473 (10th Cir. 1967).

It is impossible to discern any reasonable difference between those accused by an investigating grand jury and those otherwise accused as would justify depriving the former of the opportunities noted by Mr. Justice Brennan and specified in Rule 119. *Indeed, it would be a sad day for justice in this land if the rights afforded a defendant*

could be curtailed because of the source of the accusation, the reputation of the accuser, or his high place.

One purpose of a preliminary hearing is to determine whether a prima facie case of the defendant's guilt has been sufficiently established so as to require him to meet the charges at a trial. But, this determination can be made only *after* first affording the accused the important rights enumerated in Rule 119. The determinations of an investigating grand jury are made without affording accused *any* of these rights. The investigating grand jury acts in secret, summons such witnesses as it chooses and does not permit any participation in the proceedings by the accused or his counsel. Surely, no one would countenance allowing the Commonwealth to establish its "prima facie" case in a secret preliminary hearing from which the accused and his counsel have been excluded, whether that hearing be held before one or one hundred of our finest jurists. At its best, an investigating grand jury is no better. Such panels serve the important purpose of making the accusations, but no concept of "due process" would allow a "finding" or "recommendation" of theirs to impinge upon procedural rights of defendants who are not a party to their proceedings. Why, for example, should the accused here be prejudiced in his defense at trial by the loss of favorable testimony that might otherwise have been preserved had he a preliminary hearing? Why should these particular accuseds face indictment and trial when the Commonwealth has not established a prima facie case of their guilt in open Court at a preliminary hearing at which they are represented by counsel who may cross-examine and call witnesses? Indeed, the preliminary hearing in Pennsylvania quite often results in the discharge of the accused.

Moreover, the Commonwealth has never argued that it could not grant these accuseds a preliminary hearing, but

only that it need not. Thus, while those "normally" accused in Pennsylvania receive a preliminary hearing as of right, those "specially" accused receive one only if the prosecutor is willing. In this case the prosecutor was unwilling and as a consequence petitioners were the victims of constitutionally impermissible discrimination.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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HOWARD GITTIS,
Counsel for Petitioner, McCloskey & Co., Inc.
JOHN T. CLARY,
THOMAS J. MULLANEY,
Counsel for Petitioner, McCormick Taylor Associates.

APPENDIX.

OPINION OF JUDGE SPAETH OF THE COMMON PLEAS COURT OF PHILADELPHIA COUNTY.

[1]

IN THE

COURT OF COMMON PLEAS

FOR THE COUNTY OF PHILADELPHIA, PENNSYLVANIA

OCTOBER TERM, 1969.
Nos. 2418, 2419, 2420.

JANUARY TERM, 1970.
No. 266.

COMMONWEALTH OF PENNSYLVANIA

v.

McCLOSKEY CONSTRUCTION CO.

OCTOBER TERM, 1969.
Nos. 2420, 2421.

JANUARY TERM, 1970.
No. 266.

COMMONWEALTH OF PENNSYLVANIA

v.

JAMES McCLOSKEY

OCTOBER TERM, 1969.
No. 2417.

JANUARY TERM, 1970.
No. 266.

COMMONWEALTH OF PENNSYLVANIA

v.

McCORMICK TAYLOR ASSOCIATES

October Term, 1969.
No. 2416.

January Term, 1970.
No. 266.

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS TAYLOR

October Term, 1969.
Nos. 2677, 2678, 2679, 2680.

COMMONWEALTH OF PENNSYLVANIA

v.

HARRY BLATSTEIN

October Term, 1969.
Nos. 2674, 2675, 2676.

January Term, 1970.
No. 266.

COMMONWEALTH OF PENNSYLVANIA

v.

PAUL J. MARZULLO

October Term, 1969.
Nos. 2723, 2724.

January Term, 1970.
No. 266.

COMMONWEALTH OF PENNSYLVANIA

v.

H. H. ROBERTSON COMPANY

OPINION.

(Filed July 27, 1970.)

SPAETH, *J.*

COUNSEL FOR PARTIES.

Honorable Arlen Specter
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Assistant District Attorney
Counsel for Commonwealth

Howard Gittis, Esquire
Steven A. Arbittier, Esquire
Counsel for McCloskey Construction Co.
and James McCloskey

Thomas J. Mullaney, Esquire
Counsel for McCormick-Taylor Associates

James Francis Lawler, Esquire
Counsel for Thomas Taylor

David N. Savitt, Esquire
Counsel for Harry Blatstein

Jacob Kalish, Esquire

Louis M. Natali, Jr., Esquire
Counsel for Paul J. Marzullo

Henry T. Reath, Esquire
Counsel for H. H. Robertson Company

[2]

Nature of the Case.

This case is before the Court on motions to quash the indictments, defendants alleging that the denial of a preliminary hearing prior to indictment was a violation of the Pennsylvania Rules of Criminal Procedure.

History of the Case.

On September 4, 1969, the Investigating Grand Jury of April Term, 1969, returned its Fourth Presentment, which asked The Honorable Joseph Sloane, in charge of the Investigating Grand Jury, to direct the District Attorney "to present to an indicting Grand Jury appropriate bills of indictment" charging defendants with various offenses incident to the construction of a sports stadium in Philadelphia. (Fourth Presentment, p. 41.) Judge Sloane accepted the Presentment and stated that "it will be submitted in indictments . . . to a subsequent indicting grand jury". (Proceedings of September 4, 1969, relating to the Fourth Presentment of the Investigating Grand Jury of April Term, 1969, p. 3.)

On October 1, 1969, defendant H. H. Robertson Company filed a petition with this Court, in charge of the October Grand Jury, asking, generally, that this Court stay the District Attorney from presenting bills of indictment against it to the October Grand Jury until the District Attorney had made out a *prima facie* case at a preliminary hearing, or, if the Court would not grant that relief, that it impose certain conditions upon the manner in which evidence should be presented to the October Grand Jury. Similar petitions were filed

[3]

by defendants McCloskey Construction Company,* and James C. McCloskey on October 3, and by defendants Paul J. Marzullo and Harry Blatstein on October 6.**

On October 24 this Court filed an order dismissing defendants' petitions, stating its reasons in an opinion accompanying the order, *In re Petition of H. H. Robertson Company,* September Term, 1969, Miscellaneous No. 7540. The District Attorney thereupon presented to the October Grand Jury evidence against defendants. It has been stipulated that the evidence was the Fourth Presentment, which was read to the Grand Jury by a District Attorney's detective. The Grand Jury returned the following bills: Bill No. 2421, charging James C. McCloskey with false pretenses; Bill No. 2418, charging McCloskey Construction Company with false pretenses, and Bill No. 2419 charging it with conspiracy; Bill No. 2420, charging McCloskey Construction and James McCloskey with conspiracy; Bill No. 2417, charging McCormick-Taylor Associates with conspiracy; Bill No. 2416, charging Thomas Taylor with conspiracy; Bill No. 2677, charging Harry Blatstein with bribery of governmental offices and employees, Bill No. 2678, charging him with bribery of servants and employees, Bill No. 2679, charging him with extortion, and Bill No. 2680, charging him with malfeasance, misfeasance and nonfeasance in office; Bill No. 2674, charging Paul J. Marzullo with malfeasance, misfeasance and nonfeasance in office, Bill No. 2675, charging him

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* The indictments are against "McCloskey Construction Company", and defendant will be so referred to; in fact, its correct title is McCloskey and Co., Inc.

** Defendant Thomas Taylor had previously filed a petition with Judge Sloane as the Judge in charge of the Investigating Grand Jury, asking for a preliminary hearing. Judge Sloane denied the petition and Taylor appealed to the Superior Court, which quashed the appeal.

[4]

with malfeasance, misfeasance and nonfeasance in office, and Bill No. 2676, charging him with conspiracy; and Bills Nos. 2723 and 2724, each charging H. H. Robertson Company with conspiracy.

On January 12, 1970, the District Attorney presented to the January Grand Jury, and the Grand Jury returned, Bill No. 266, charging that defendants Thomas Taylor, H. H. Robertson Company, McCormick-Taylor Associates, McCloskey Construction Company, James McCloskey, and Paul Marzullo "did conspire to obtain money by false pretenses from the City by falsely representing to the said City [various matters with respect to the construction of the stadium].

On April 22 The Honorable Vincent A. Carroll, President Judge, assigned the foregoing indictments to this Court "for all pre-trial and post-trial motions and trial". After conference with the Assistant District Attorney and defense counsel, the Court ordered: that all pre-trial motions either by the Commonwealth or by any defendant must be filed by June 1; that briefs in support of the motions must be filed by June 15; and that argument on the motions would be heard during the week of June 22. At a second conference the order in which the motions should be argued was agreed upon by the Assistant District Attorney and defense counsel, and the agreement was approved by the Court. In accordance with the agreement, argument was heard on June 22 through 26, and also on June 29. Among the motions thus argued were defendants' motions to quash the indictments as defective because defendants had received no preliminary hearing. Thus, defendants ask the Court to reverse its decision of October 24, which held that defendants were not entitled to a preliminary hearing.

[5]

Discussion.

In deciding earlier in these proceedings that defendants were not entitled to a preliminary hearing, this Court relied upon two propositions, each in accord with the decided cases: 1) that there was no constitutional right to a preliminary hearing; and 2) that the Pennsylvania Rules of Criminal Procedure did not guarantee a preliminary hearing. (Pages 31-38 of the Court's opinion of October 24, 1969, in *In re Petition of H. H. Robertson Company,* September Term, 1969, Miscellaneous No. 7540.) Since this Court's decision, the first of these propositions has been undermined by the decision of the United States Supreme Court in *Coleman v. Alabama,* 38 U. S. L. W. 4535 (filed on June 22, 1970), and the second has been overturned by the decision of the Pennsylvania Supreme Court in *Commonwealth v. Rose,* 437 Pa. 30, 261 A. 2d 586 (filed on January 30, 1970). These decisions will be considered in the order in which they were filed. As will appear, because of them it will be necessary for this Court to reverse its earlier decision. The Court cannot but confess to some rueful feelings that this should be necessary. Perhaps the Court should have foreseen the decisions. In the criminal law, one cannot step twice in the same stream.

1. *Commonwealth v. Rose.*

In *Commonwealth v. Rose,* 437 Pa. 30, 261 A. 2d 586 (1970), the Supreme Court had before it two appeals, one by Joseph Rose, the other by D. Arthur Magaziner.

[6]

Rose had been tried before a judge and jury on an indictment charging fornication and bastardy. After the jury's verdict of acquittal, the trial judge at the request

of the assistant district attorney sat as committing magistrate and held [Rose] on a charge of perjury based on his testimony as to his whereabouts during the time in question. No criminal complaint accusing [Rose] of perjury was ever issued, and no preliminary hearing was ever held. (437 Pa. at 33, 261 A. 2d at 587.) The grand jury approved an indictment charging Rose with perjury. Rose filed a motion to quash the indictment. The lower court granted the motion,

> giving as its principal reason the failure to adhere to the Rules of Criminal Procedure in that no complaint was ever issued nor a preliminary hearing ever held. On appeal the Superior Court reversed that order, 214 Pa. Superior Ct. 50, 251 A. 2d 815 (1969), holding that a complaint and preliminary arraignment were unnecessary because Rose knew of the specific charges against him and that the court's action itself constituted a preliminary hearing. (437 Pa. at 33, 261 A. 2d at 587.)

On appeal allowed by the Supreme Court the order of the Superior Court was vacated and the order of the lower court quashing the indictment was reinstated.

Magaziner was called as a witness in a minority stockholders' action and testified that certain statements at a stockholders' meet-

[7]

ing had not occurred. Later, after hearing a tape recording of the meeting, he testified that he had erred but maintained that he had not heard the statements. The trial judge charged Magaziner with perjury. Magaziner refused to enter bail, and on a rule for a hearing on a writ of habeas corpus, the writ was dismissed; the hearing judge then

assumed the role of a committing magistrate and held a preliminary hearing on the perjury charge. He did this despite the fact that no complaint had been filed. Again Magaziner refused to enter bail and made application for a second writ of habeas corpus. (437 Pa. at 34, 261 A. 2d at 588.) The writ was dismissed and the Superior Court quashed Magaziner's appeal. On appeal allowed by the Supreme Court the order of the Superior Court was vacated and the order of the lower court denying the writ was reversed.

In arriving at these two decisions the Supreme Court in an opinion by Mr. Justice Cohen said:

> Our Rules of Criminal Procedure speak in clear, inclusive terms. Nothing in them suggests that they do not apply to common pleas judges who sit as committing magistrates. Therefore, we hold that common pleas judges when sitting as committing magistrates must follow the rules precisely.
>
> This means that proceedings must be initiated by a written complaint. Rule 102 clearly states, "all proceed-

[8]

> ings shall be initiated by a written complaint," and until other rules carve out exceptions, the reference to "all" must be taken literally.[1] It is no answer that

---

1. After May 1, 1970 see Rules 102 and 118. (437 at 35-36, 261 A. 2d at 588.)*

* The rules as of May 1, 1970, are as follows: Rule 102 provides that criminal proceedings may be instituted by a written complaint "in any case", by arrest without a warrant in four specified types of cases, and by citation for specified summary offenses. Rule 118 provides that "[w]hen a defendant has been arrested without a warrant, he shall be taken without unnecessary delay before the proper issuing

the particular defendant already has notice of the charges against him. Notice or knowledge of a charge is not a unitary thing; it is a spectrum which ranges from total lack of knowledge to a general impression to detailed awareness of all relevant facts. Rule 10[1] in prescribing the contents of a complaint, established a standard of knowledge that all accused must possess. For this Court and other courts to have to determine on a case-by-case basis whether a particular defendant had the information that would have been included in a complaint makes no sense when the time and energy that would be involved is considered. Rules 102 and 104 provide a clear and simple procedure; until exceptions to those rules are adopted, they must be followed in all cases.

This also means that a preliminary arraignment must be held pursuant to Rule 116 and, if not waived, a preliminary hearing held pursuant to Rules 116g, 117, 118 and 119. In the Rose appeal, the Superior Court held that trial on the fornication and bastardy charge was itself the preliminary hearing on the perjury charge. It is difficult to uphold such an action as a valid preliminary hearing when Rose did not even know that it was such. As far as he knew, he was only being charged with fornication and bastardy. If he had known that the trial

---

authority where a complaint shall be filed against him . . . . If the complaint charges a court case, the defendant shall be given an immediate preliminary arraignment . . . . If the complaint charges a summary offense, the defendant shall be given an immediate trial . . . ." Rule 119 provides that "[a]t the preliminary arraignment, the issuing authority shall . . . inform the defendant . . . [o]f his right to have a preliminary hearing . . . ." Thus there have been stylistic changes, with some consequent renumbering of the rules, but the requirements of complaint, preliminary arraignment, and preliminary hearing, insisted upon in *Rose*, have not been modified.

[9]

> was also a preliminary hearing on a perjury charge, he might have taken certain steps and called various witnesses in defense of that charge. We cannot say that what occurred at the trial is essentially what would have happened at a preliminary hearing, because there is no way of knowing how Rose would have defended himself if he had known of that charge.
>
> Since no written complaint was filed against Magaziner, the procedure followed was defective. The procedure was likewise defective in the Rose action because no written complaint was filed and because no proper preliminary arraignment and no preliminary hearing were held.

If this statement is applicable to the present case, defendants' motions to quash the indictments must be granted; each of the partic-

[10]

ulars insisted upon by the Supreme Court has been violated: there has been no complaint issued against any defendant pursuant to Rules 102 and 104; there has been no preliminary arraignment pursuant to Rule 116; and there has been no preliminary hearing pursuant to Rules 116g, 117, 118, and 119. The Assistant District Attorney, however, has argued that the statement is not applicable, and that *Rose* should be distinguished from the present case. Examination will show, however, that such distinctions as exist are of no substance.

The first distinction that the Assistant District Attorney suggests is that defendants have no need of a complaint,

preliminary arraignment, and preliminary hearing because they are fully informed by the Investigating Grand Jury's Fourth Presentment of the charges against them. This distinction does not exist as a matter of fact; and if it did, it would be immaterial.

The distinction does not exist as a matter of fact because the Fourth Presentment is in narrative form and its statements are conclusions derived from testimony a transcript of which the Commonwealth has refused to release (beyond releasing to each individual defendant a transcript of what he testified to the Investigating Grand Jury). On the Magaziner appeal in *Rose*, on the other hand, Magaziner was given a preliminary hearing before a judge sitting as a committing magistrate and so could confront and cross-examine witnesses against him. Thus, it cannot be maintained that the defendants in *Rose* knew less than defendants here; Magaziner knew more.

Even if it could be said that defendants knew as much from the Fourth Presentment as they would learn from a preliminary hearing,

[11]

it would be immaterial. Although Magaziner had had a preliminary hearing, still the indictment against him was quashed, the Supreme Court stating that "[s]ince no written complaint was filed against Magaziner, the procedure followed was defective." (437 Pa. at 36, 261 A. 2d at 589.) Under *Rose* the question is not what a defendant knows, but whether the rules have been followed.

That this is the question is unmistakable not only from *Rose* itself but from its history. In *Rose* the Commonwealth made the same argument that it makes here: no complaint, preliminary arraignment, or preliminary hear-

ing were necessary because the defendant knew the charges against him. The Superior Court accepted the argument, stating:

> In these limited circumstances, adherence to the requirements of a sworn complaint and a preliminary arraignment result in expense, delay and duplication of proceedings without in any degree affecting the fairness of the proceedings against the accused. The purpose of requiring a sworn complaint is to inform an accused of the specific nature of the charge against him. Rule 104. Similarly, the purpose of preliminary arraignment is to explain to the accused the charges against him and inform him of his rights to counsel and to a preliminary hearing. Rule 116(g). The requirement of Rule 116(g)(1) that preliminary hearings shall not be held less than three days after preliminary arraignment is primarily to afford an accused the opportunity to prepare for preliminary hearing. When an offense has been committed in court before the judge

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> who sits as committing magistrate, the accused has knowledge of the charges against him and the facts and witnesses necessary to show that a prima facie case has not been established are present and available [footnote omitted]. (214 Pa. Super. at 55-56, 251 A. 2d at 818.)

The Supreme Court, however, as appears from the passage of its opinion that has been quoted above, specifically rejected this reasoning, stating that it would not proceed "to determine on a case-by-case basis whether a particular defendant had the information that would have been included

in a complaint", and that the rules must be followed "precisely". Indeed, this point was stated with particular force by Mr. Justice Roberts, joined by Mr. Chief Justice Bell. They dissented from the majority's opinion in *Rose* because they regarded both Rose's and Magaziner's appeals as interlocutory. In dissenting, however, Mr. Justice Roberts said:

> While I am in complete agreement with the majority's interpretation of our Rules of Criminal Procedure, I must respectfully dissent from the majority's disposition of these two appeals. In my opinion, both appeals should be quashed as interlocutory.
>
> I think there is no doubt that the Commonwealth must strictly adhere to our Rules of Criminal Procedure. Likewise, it is clear that this Court must strictly enforce compliance. We certainly do not promulgate Rules merely to have them ignored or circumvented. But the issue before us now is not whether we should enforce our Rules, but when we should do so. In the instant cases, we may

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> never be required to enforce compliance, since the Commonwealth may not be able to secure convictions. And if convictions are obtained, we can deal with these violations in our normal course of adjudication. Certainly the Commonwealth should realize that this Court will not allow a conviction to stand which has been secured in violation of our Rules. (437 Pa. at 36-37, 261 A. 2d at 589.)

Next the Assistant District Attorney suggests that the present case is outside the rules found in *Rose* to have been violated.

As an initial proposition this suggestion is most persuasive, and the Schuylkill County Criminal Court and this Court in its earlier decision in *In re Petition of H. H. Robertson Company, supra,* accepted it. Thus this Court said, at pages 32-33 of its earlier decision:

> It may be granted that the Pennsylvania Rules of Criminal Procedure are susceptible of being read as providing that in every case an accused is entitled to a preliminary hearing. Thus Rule 102 provides that "all [criminal] proceedings" are to be initiated by a written complaint; and Rule 116(b)(2) states that at the preliminary arraignment the defendant is to be advised of his "right to have a preliminary hearing." Nevertheless, it would appear that the Rules do not abolish the procedure of presenting to a grand jury, without a preliminary hearing, a district attorney's bill. The reasons for this conclusion are stated in *Commonwealth v. Spencer,* 44

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D. & C. 2d 209, 210-12 (Crim. Co. Schuylkill Co. 1968), as follows:

> > [T]he matter of the presentation of the district attorney's bill is a long established and an ancient right in the criminal law of the Commonwealth of Pennsylvania. Before the court could determine that the Pennsylvania Rules of Criminal Procedure abolish such a procedure, it would have to be satisfied that the rules specifically intend to abolish this method of procedure in criminal matters. [Further quotation followed.]

Nevertheless, however persuasive this reasoning may once have been, it can no longer be accepted.

In *Rose* the procedure involved was also long established and ancient: the right of a trial judge to sit as a committing magistrate, and to hold for perjury a person who had testified before him. There was no reference in the rules to this procedure. Thus it was natural to conclude that the draftsmen of the rules did not intend to affect it; and the Superior Court did so conclude, stating:

> [T]o apply Rules 102 and 116 to this case would end the power of the judges of the Court of Quarter Sessions to sit as committing magistrates on offenses committed in the courtroom. This is neither intended by the Rules of Criminal Procedure nor consistent with their stated goals of simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. (214 Pa. Super. at 56, 251 A. 2d at 818.)

[15]

The Supreme Court, however, as appears from the passage of its opinion that has been quoted above, specifically rejected this reasoning. Said the Court:

> Our Rules of Criminal Procedure speak in clear, inclusive terms. Nothing in them suggests that they do not apply to common pleas judges who sit as committing magistrates. Therefore, we hold that common pleas judges when sitting as committing magistrates must follow the rules precisely. (437 Pa. at 35, 261 A. 2d at 588.)

If nothing in the rules suggests that they do not apply to one established procedure unmentioned by the rules—common pleas judges sitting as committing magistrates—, nothing in the rules suggests that they do not apply to

another established procedure unmentioned by the rules—proceeding on a district attorney's bill, without preliminary hearing.

In explaining this inclusive interpretation of the rules, the Supreme Court noted that "Rule 102 clearly states, 'all proceedings shall be initiated by a written complaint', and until other rules carve out exceptions, the reference to 'all' must be taken literally", and that "Rule 104, in prescribing the contents of a complaint, established a standard of knowledge that all accused must possess." (437 Pa. at 35, 261 A. 2d at 588.) Thus, said the Court:

> Rules 102 and 104 provide a clear and simple procedure; until exceptions to those rules are adopted, they must be followed in all cases.

[16]

> This also means that a preliminary arraignment must be held pursuant to Rule 116 and, if not waived, a preliminary hearing held pursuant to Rules 116g, 117, 118 and 119. (437 Pa. at 35, 261 A. 2d at 588.)

The only question remaining, therefore, is whether proceeding on a district attorney's bill without complaint, preliminary arraignment, and preliminary hearing, is a procedure recognized by the rules as an exception carved out of the general requirement of Rules 102 and 104; and the answer to the question is that it is not.

The rules governing the institution of criminal proceedings are collected in one chapter, as Rules 102 through 129.* There is no reference in those rules to proceeding on a district attorney's bill. The only reference anywhere in the rules possibly pertinent to the present proceeding

* Rules 102 through 144, as of May 1, 1970.

is in Rule 212, which is the first rule of the chapter concerning the indictment, and is entitled "Definitions." Rule 212(c) defines a "presentment" as "a formal accusation made by a grand jury, drafted by the Commonwealth's attorney with leave of court and submitted for action to a subsequent indicting grand jury." Apart from the fact that a "definition" cannot be read as an "exception", it will be observed that Rule 212(c) is not in conflict with, and hence cannot be an exception to, the requirement of Rules 102, 104, 116, 117, 118, and 119, that all criminal proceedings should proceed from complaint to preliminary arraignment to preliminary hearing. This is so because nothing in Rules 102, 104, 116, 117,

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118, and 119 interferes with the investigating grand jury as a legal institution, nor diminishes its traditional powers in any way. An investigating grand jury may continue to investigate, and upon concluding its investigation, may submit a presentment formally accusing a person of crime and recommending that he be indicted. The rules, as construed in *Rose,* only require that before the accused may be indicted, a complaint must be filed, and a preliminary arrignment and a preliminary hearing must be held.

It is true that this leaves for consideration the clause in Rule 212(c), that a presentment is an accusation "submitted for action to a subsequent indicting grand jury." There seems no tidy way to harmonize this clause with the other rules. Perhaps it may be read as recognizing that once the accused has been held at the preliminary hearing for the grand jury, the district attorney may choose to offer to the grand jury as evidence against the accused the presentment prepared by the investigating grand jury; this would not be to say that the district attorney has an

absolute right to proceed in such a manner; his right would be limited by other principles; thus, for example, if the presentment made an accusation of two crimes, but the evidence at the preliminary hearing showed only one, the grand jury could indict only for the one, and might not be able to see what the presentment said about the other. However this may be, the slight untidiness created by the reference in Rule 212(c) to submitting a presentment to a grand jury cannot be used as the basis for upholding in the present case the avoidance by the Commonwealth of complaint, preliminary arraignment, and preliminary hearing. To do so would be in defiance both of the logic of *Rose* and of

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the notably forceful statements made there by Mr. Justice Cohen, that the rules are to be followed "precisely", and that "all" means "all" (437 Pa. at 35, 261 A. 2d at 588), and by Mr. Justice Roberts, that "We certainly do not promulgate Rules merely to have them ignored or circumvented" (437 Pa. at 36, 261 A. 2d at 589).

One final observation may be made. In the present case the Court has also heard argument and received briefs on a motion by the Commonwealth for consolidation and on motions by various of defendants for severance, a bill of particulars, and discovery. Repeatedly during this argument factual issues arose, the Commonwealth each time replying that defendants had only to consult the Fourth Presentment. As has been mentioned, however, the Fourth Presentment is not the transcript of a hearing but a statement by the Investigating Grand Jury of the conclusions at which it arrived as a result of the testimony that it received. To be sure, the Presentment appears to be a full

statement, the Investigating Grand Jury going to considerable trouble to explain why it arrived at the conclusions it did, and sometimes quoting excerpts of the testimony that it received. These facts, however, do not resolve the issue presently before the Court, which was stated during argument by counsel in a companion case as follows:

> Almost every single petition that has been presented to Your Honor is presented because of what these Defendants have been deprived of [*i.e.*, a preliminary hearing], and they have been deprived of it for no reason.
>
> * * *
>
> [19]
>
> And it is not satisfactory for the Commonwealth to come before you and wave that presentment because that presentment goes out the window the minute we walk in that courtroom. That presentment has no legal validity other than to get the Commonwealth where they are.
>
> It is not a bill of particulars. I cannot jump up in the courtroom and say your witness can't say that, he said this in the presentment. You make this charge in the presentment. Now you're coming in with evidence in another direction entirely.
>
> * * *
>
> They may have an Indictment No. 107 which appears from the presentment to be based on Facts A, B, C, D, E and F, and yet when I get into that courtroom I don't hear any of that. And those indictments are general enough to take in anything. I hear the proof going down the other side of the courtroom.

And I hold that that presentment is like a rabbit in the hat. You see it when the Commonwealth wants you to, but when you get into the courtroom it's not around.

That bill of indictment is not made a part of it as if it were a bill of particulars. It's just a way the Commonwealth got here.

And there is no earthly reason why they should not go the other route [*i.e.*, complaint, preliminary arraignment, and preliminary hearing]. It is entirely available to them. It has always been entirely available to them.

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. . . . The rules seem to have all been centered upon the fact that there were going to be proceedings this way.

* * *

Your Honor has before you motions for separate trials, motions for severance, a variety of motions, motions to suppress evidence where you have to know what the case is about.

We cannot be expected to rely upon what the Commonwealth set forth in its presentment because what the Commonwealth has given you is its conclusion from the transcripts which it alone has in its possession. No defendant ought to have crucial areas of concern to him decided in such a fashion. No court would allow a search warrant to be issued on a conclusionary basis. We don't have facts here, sir.

If Your Honor had a transcript of a preliminary hearing, we could hand it to you. You'd quickly prob-

> ably gather whether or not it was accusatory, whether or not there was ground for trying the whole thing together, what the evidence was. How in the world you can be expected to make those decisions without knowing that I don't know. (Proceedings of June 23, 1970, N. T. 58-61.)

This is well stated. Because of the Court's ruling on the motions to quash now under consideration, the Court will not consider the motions for consolidation, severance, bill of particulars, and discovery. However, counsel's point, that decision on those motions

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was complicated by the fact that no preliminary hearing had been held, remains, and it illustrates the fact that if *Rose* is accepted as meaning just what it says it means, "a clear and simple procedure" will ensue (437 Pa. at 35, 261 A. 2d at 588), whereas if *Rose* is held for some reason not to be applicable to the present case, an uncertain and difficult procedure may ensue, if not in defendants' cases, then in others.

2. *Coleman v. Alabama.*

This Court in its earlier decision in *In re Petition of H. H. Robertson Company*, at pages 31-32, cited and relied upon *Commonwealth v. O'Brien*, 181 Pa. Super. 382, 387, 124 A. 2d 666, 669 (1956), *rev'd on other grounds*, 389 Pa. 109, 132 A. 2d 265 (1957), and *Commonwealth ex rel. Walls v. Maroney*, 416 Pa. 290, 294, 205 A. 2d 862, 864 (1965), for the proposition that there is no constitutional right to a preliminary hearing. Thus in *O'Brien* it was said: "It is also settled that one has no *constitutional* right to be pres-

ent at a preliminary hearing, or, indeed, even to have one." (*Id.*) Since the decision of the United States Supreme Court in *Coleman v. Alabama,* 38 U. S. L. W. 4535 (U. S. June 22, 1970), such statements cannot be read without a qualification, and the qualification is significant to the decision of the present case.

In *Coleman* the defendants had been convicted in an Alabama Circuit Court of assault with intent to murder. Under Alabama law "[t]he preliminary hearing is not a required step . . . . The prosecution may seek an indictment directly from the grand jury without a preliminary hearing." (38 U. S. L. W. at 4537.) If there is a pre-

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liminary hearing, its only purpose is to determine whether there is sufficient evidence to hold the accused for the grand jury, and if there is, to set bail. Also, if the accused is not represented at the preliminary hearing by counsel, nothing occurring at the hearing can be used to the prejudice of the accused at trial. (38 U. S. L. W. 4537.) The defendants did have a preliminary hearing; they were not represented by counsel; and the State was not permitted to use against them at trial anything that occurred at the preliminary hearing. (38 U. S. L. W. at 4538.) They contended nevertheless "that Alabama's failure to provide them with appointed counsel at the [preliminary] hearing . . . unconstitutionally denied them the assistance of counsel." (38 U. S. L. W. at 4535.)

The Supreme Court did not hold that a preliminary hearing is constitutionally required. It did hold that if there is a preliminary hearing, the accused is entitled to the assistance of counsel at the hearing. Said the Court:

> The determination whether the hearing is a "critical stage" requiring the provision of counsel depends, as

noted, upon an analysis "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." *United States v. Wade, supra,* [388 U. S. 218 (1966)], at 227. Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case,

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that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a "critical stage" of the State's criminal process at which the accused is "as much entitled to such aid [of counsel] . . . as at the trial itself." *Powell v. Alabama, supra,* [287 U. S. 45 (1932)], at 57. (38 U. S. L. W. at 4537-38.)

The opinion of the Court was by Mr. Justice Brennan, and Part II of the opinion, a portion of which has just been quoted, was joined by Mr. Justice Douglas, Mr. Justice White, and Mr. Justice Marshall. Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Harlan, and Mr. Justice White concurred in the holding that the defendants were entitled to counsel at the preliminary hearing, although they did so with varying degrees of emphasis. Mr. Justice Stewart and The Chief Justice dissented.

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It has been seen in the preceding section of this opinion that under Pennsylvania practice (as contrasted to Alabama practice) a preliminary hearing is required. *Commonwealth v. Rose, supra.* Accordingly, the only problem created by *Coleman* so far as Pennsylvania practice is concerned will be to ensure representation of the accused at the preliminary hearing. Suppose, however, that the Commonwealth were correct, that although *Rose* does require a preliminary hearing in most cases, it does not require one in a case such as the present case, which was initiated by an investigating grand jury's presentment and a district attorney's bill. A serious constitutional question would be presented: Would such a construction of the rules be a violation of the provision of the Fourteenth Amendment, § 1, that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."?

In considering this question it would be immaterial that the violation, if there were one, would be by virtue of rules of court; for rules of court are just as much "State action" as are legislative enactments. *See: Douglas v. California,* 372 U. S. 353 (1963) (holding invalid as a denial of equal protection a California rule of criminal

procedure). The problem would be to determine what might be the purpose of classifying criminal prosecutions in such a way that sometimes an accused would receive a preliminary hearing and sometimes he would not, particularly when this would mean, as Mr. Justice Brennan noted in the passage of his opinion that has been quoted above, that those who did not receive a preliminary hearing would be deprived of many significant opportunities that those who did receive a preliminary hearing would enjoy: the opportunity

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to "expose fatal weakness in the State's case"; to "fashion a vital impeachment tool"; to "preserve testimony favorable to the accused"; and to "discover the case the State has . . . and make possible the preparation of a proper defense." (38 U. S. L. W. at 4537-38.)

In determining the possible purpose of a classification, the courts have developed various tests. *See:* Note, *Developments in the Law—Equal Protection*, 82 Harv. L. R. 1065, 1077 *et seq.* (1969). Without stating these tests, it would seem that under any of them the classifications that would result from accepting the Commonwealth's view of the rules would be invalid as arbitrary and unrelated to the achievement of any rational purpose.

At least two classifications would result. The first classification would be between, on the one hand, a class composed of most persons accused of crime, who would receive a preliminary hearing and hence enjoy the opportunities noted by Mr. Justice Brennan, and on the other hand, a class composed of such persons as defendants, who had been accused by an investigating grand jury and indicted upon a district attorney's bill without a preliminary

hearing. There would seem to be no reason for such a classification. The second classification would be within the class composed of persons like defendants. Under the Commonwealth's view of the rules, a district attorney would not be precluded from choosing to proceed against some of such persons via complaint—preliminary arraignment—preliminary hearing. Indeed, in the present case the Commonwealth has never argued that it could not grant defendants a preliminary hearing but only that it need not. There would seem to be no reason for permitting a district attorney thus to create a classification at will,

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uninhibited by any guidelines or restrictions. In the present case, for example, what would be the purpose of a classification between, on the one hand, those of defendants that the District Attorney chose to proceed against via complaint—preliminary arraignment—preliminary hearing, and on the other hand, those of defendants that he chose to proceed against on a district attorney's bill? If there were something that a district attorney had to fear from a preliminary hearing, with respect to a particular defendant, such a view of the rules would permit him to circumvent the preliminary hearing in the case of that defendant.

Whether the classifications resulting from the Commonwealth's view of *Rose* and of the rules would be valid need not be decided. It is sufficient to note that decision would involve a serious constitutional question. If a court in construing a statute (and a rule has the force of a statute) is confronted with a serious constitutional question, it should if possible adopt that construction of the statute that will avoid the constitutional question. *See, e.g., Commonwealth v. Janoff and Haugh,* Supreme Court

of Pennsylvania, January Term, 1970, No. 873, opinion by Mr. Justice Roberts, July 2, 1970. Accordingly, if there is an ambiguity in the rules, this court should construe the rules as requiring a preliminary hearing.

3. *Summary and conclusion.*

The Pennsylvania Rules of Criminal Procedure do not refer to prosecutions initiated by a district attorney's bill. Accordingly, the Schuylkill County Court in *Commonwealth v. Spencer* and this

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Court in *In re Petition of H. H. Robertson Company* concluded that the rules were not intended to apply to such prosecutions. In *Commonwealth v. Rose* the Superior Court similarly concluded that the rules were not intended to apply to prosecutions initiated by a trial judge sitting as a committing magistrate. On appeal in *Rose,* however, the Supreme Court held that the rules were intended to apply to all prosecutions unless the rules noted a specific exception. The Supreme Court stated that this was to ensure that each accused should possess the same "standard of knowledge" and meant that every prosecution, unless otherwise specifically noted in the rules, should be a prosecution by complaint to preliminary arraignment to preliminary hearing. The rules do not note a specific exception for cases in which an investigating grand jury makes an accusation by presentment, and the district attorney then proceeds against the accused upon a district attorney's bill. Therefore, in the case of an accusation by presentment, the district attorney must proceed as in the usual case: by complaint, preliminary arraignment, and preliminary hearing.

This conclusion is supported by the decision of the

United States Supreme Court in *Coleman v. Alabama*. There it was held for the first time that the preliminary hearing was if it occurred, a "critical stage" of the prosecution. To construe the rules as requiring a preliminary hearing in some cases but not in others would present a serious constitutional issue of equal protection. The Pennsylvania Supreme Court's construction of the rules in *Rose* avoids this issue.

When the rules are applied to the present case, it is apparent that the procedure followed was defective, for no complaint was issued, nor any preliminary arraignment or preliminary hearing held.

[28]

ORDER OF COMMON PLEAS COURT OF PHILADELPHIA COUNTY.

ORDER

And Now, July 27, 1970, defendants' motions to quash the indictments are granted.

Spaeth,
J.

Filed: July 27, 1970.
Honorable Arlen Specter
John Rogers Carroll, Esquire
Howard Gittis, Esquire
Steven A. Arbittier, Esquire
Thomas J. Mullaney, Esquire
James Francis Lawler, Esquire
David N. Savitt, Esquire
Jacob Kalish, Esquire
Louis M. Natali, Jr., Esquire
Henry T. Reath, Esquire

ORDER OF SUPERIOR COURT OF PENNSYLVANIA.

[No. 735]

IN THE
SUPERIOR COURT OF PENNSYLVANIA.

No. 1377, October Term, 1970.

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

JAMES McCLOSKEY.

Appeals From the Order of the Court of Common Pleas, Trial Division, Criminal Section, of Philadelphia County at No. 266, January Term, 1970 and Nos. 2420, 2421, October Term, 1969.

Per Curiam Filed: September 25, 1970

The six Judges who heard this appeal being equally divided, the order of the court below is affirmed.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

[540]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.
No. 157 JANUARY TERM, 1971.

APPEALS FROM ORDERS DATED SEPTEMBER 25, 1970, OF THE SUPERIOR COURT OF PENNSYLVANIA, AS OF OCTOBER TERM, NOS. 1377 TO 1384.

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

JAMES McCLOSKEY, HARRY BLATSTEIN, McCORMICK TAYLOR ASSOCIATES, H. H. ROBERTSON COMPANY, PAUL MARZULLO, FRANK M. STEINBERG, THOMAS TAYLOR, McCLOSKEY & COMPANY, INC.

OPINION OF THE COURT.

ROBERTS, *J.* Filed: May 13, 1971.

The Commonwealth here appeals from decisions by an evenly divided Superior Court [1] affirming various orders

1. *Commonwealth v. Blatstein,* 217 Pa. Superior Ct. 788, 269 A. 2d 151 (1970); *Commonwealth v. H. H. Robertson Company,* 217 Pa. Superior Ct. 789, 269 A. 2d 367 (1970); *Commonwealth v. McCloskey,* 217 Pa. Superior Ct. 789, 269 A. 2d 151 (1970); *Commonwealth v. MCloskey Construction Company,* 217 Pa. Superior

of the Philadelphia Court of Common Pleas quashing indictments against and suppressing evidence obtained from the several defendants. This complex appeal involves numerous issues, all of which center on two problems: (1) whether a criminal proceeding can lawfully be commenced by an investigating grand jury's presentment to an indicting grand jury without affording defendant an opportunity for a preliminary hearing; and (2) whether, or to what degree, a subpoened witness and potential defendant before an investigating grand jury is entitled to the assistance of counsel to aid him in asserting his right against self
[540-2]
incrimination guaranteed both by the Fifth Amendment, applied to the states through the Fourteenth Amendment, and Article I, Section 9 of the Pennsylvania Constitution.

As to the former issue, we believe that an indictment based upon an investigating grand jury's presentment directly to an indicting grand jury with leave of court is lawful, even though no preliminary hearing was held. Concerning the assistance of counsel and the right against self incrimination, while we do not today hold that a witness is entitled to have counsel present in the hearing room or that he is entitled to step outside the door and consult with counsel after every question, we do believe that a witness should receive a warning by the court in charge of the investigating grand jury that if the witness is confused or believes his answer might be incriminating, he may come before the court accompanied by counsel and be advised of his rights. This procedure was not followed with reference to certain of the individual appellees now before

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Ct. 790, 269 A. 2d 367 (1970); *Commonwealth v. McCormick Taylor Associates*, 217 Pa. Superior Ct. 790, 269 A. 2d 152 (1970); *Commonwealth v. Marzullo*, 217 Pa. Superior Ct. 791, 269 A. 2d 152 (1970); *Commonwealth v. Steinberg*, 217 Pa. Superior Ct. 791, 269 A. 2d 146 (1970); *Commonwealth v. Taylor*, 217 Pa. Superior Ct. 792, 269 A. 2d 146 (1970).

us. Accordingly, those indictments in any way based upon a defendant's own testimony given without this warning and in violation of his right against self incrimination must be quashed.

I. BACKGROUND.

The investigating grand jury of April Term, 1969, was convened by court order pursuant to a petition submitted by the Philadelphia District Attorney alleging various offenses were being or had been committed with respect to housing, urban renewal and public construction.

a. Frank M. Steinberg.

After hearing numerous witnesses and receiving voluminous evidence, the investigating grand jury returned a presentment [2] on August 18, 1969, requesting that appellee, Frank M. Steinberg, a former Chairman of the Philadelphia Housing Authority, be indicted on several counts. [54-3]

The court in charge of the investigating grand jury (Sloane, J.) accepted the presentment, and the district attorney with leave of court then submitted the recommendations to the September indicting grand jury, which returned true bills against appellee Steinberg charging him with malfeasance, misfeasance and nonfeasance in office; conspiracy; deposit of public money for gains; violation of the State Adverse Interest Act; practice of corrupt solicitation; and corrupt solicitation.[3] All these indictments were returned without any complaint having been issued or any preliminary arraignment or preliminary hearing having been held.

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2. The "second" presentment.
3. The charges were embodied in Bills No. 879-90, 892-97.

Appellee filed several pre-trial motions challenging his indictments, all of which were argued during the week of June 22, 1970, when similar motions by other appellees in this case were also being heard. Steinberg's motion to quash was granted on the basis that he had been deprived of his right to a preliminary hearing, and hence his motions for suppression of evidence, pre-trial discovery and severance were dismissed as moot by the court (Spaeth, J.). The Commonwealth appealed from the granting of the motion, and the Superior Court affirmed by an evenly divided court.[4]

b. The Stadium Cases.

The same April, 1969, investigating grand jury returned a separate presentment [5] on September 4, 1969, recommending indictments against the other appellees on various charges relating to the construction of an all purpose municipal sports stadium in Philadelphia costing approximately $50,000,000. The court (Sloane, J.) accepted the presentment.

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Defendant Thomas Taylor, the district manager of H. H. Robertson Company, the steel subcontractors for the stadium, petitioned the court in charge of the investigating grand jury to grant him a preliminary hearing. His petition was denied, and his appeal to the Superior Court was quashed.

Then, on October 1, 1969, defendant H. H. Robertson Company itself filed a petition before the court in charge of the October, 1969 indicting grand jury (Spaeth, J.) seeking to restrain the district attorney from presenting the

4. See note 1 supra.

5. The "fourth" presentment.

investigating grand jury's recommendations to the indicting grand jury until a preliminary hearing had been held, or else until certain conditions had been imposed on the manner in which the evidnece was to be presented to the indicting grand jury. Defendants McCloskey and Company, Inc., the general contractor for the stadium, and James C. McCloskey, the firm's executive vice president, filed similar petitions on October 3, 1969, and defendants Paul Marzullo, Director of Architecture and Engineering for Philadelphia, and Harry Blatstein, the stadium coordinator, did likewise on October 6, 1969.

On October 24, 1969, Judge Spaeth entered an order dismissing defendants' petitions, setting forth his reasons for his action in an opinion, *In re Petition of H. H. Robertson Company,* September Term, 1969, Miscellaneous No. 7540. The district attorney then presented evidence[6] against the stadium defendants to the October indicting grand jury, which returned the following bills: charges of false pretenses and conspiracy against James C. McCloskey; charges of false pretenses and conspiracy against McCloskey and Company, Inc.[7]; charges of conspiracy against

[540-5]

McCormick-Taylor Associates, the stadium architects; charges of conspiracy against Thomas Taylor; charges of bribery of government offices and employees, bribery of servants and employees, extortion, and malfeasance, misfeasance and nonfeasance in office against Harry Blatstein; charges of malfeasance, misfeasance, and nonfeasance in office and conspiracy against Paul J. Marzullo; and charges

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6. It has been stipulated that this evidence consisted of the "fourth" presentment.

7. Although the indictment was against "McCloskey Construction Company", we will refer to this defendant by its proper name, "McCloskey & Company, Inc."

of conspiracy against H. H. Robertson.[8] The district attorney also submitted a consolidated bill based on the same September presentment to the January, 1970, indicting grand jury, which returned a true bill[9] charging Thomas Taylor, H. H. Robertson Company, McCormick-Taylor Associates, McCloskey & Company, Inc., James McCloskey, and Paul Marzullo with conspiracy to obtain money by false pretenses from the City of Philadelphia. None of the above indictments were preceded by either a complaint, preliminary arraignment, or preliminary hearing.

The President Judge of the Philadelphia Court of Common Pleas[10] assigned all the foregoing cases to Judge Spaeth "for all pre-trial and post-trial motions and trial." Various pre-trial motions requesting, inter alia, the suppression of evidence, the quashing of indictments, and severance were filed, and arguments were heard during the week of June 22, 1970.[11]

On July 27, 1970, in a departure from his October 24, 1969, decision, Judge Spaeth filed four opinions granting the motions to quash and to suppress testimony of certain defendants. As to all the stadium defendants, Judge Spaeth concluded that in light of the intervening decision of this Court in *Commonwealth v. Rose* and *Commonwealth ex rel. Magaziner*

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8. All these charges were embodied in Bills No. 2416-21, 2674-78, and 2723-24.

9. Bill No. 266.

10. The late Hon. Vincent A. Carroll.

11. The following pre-trial motion were filed:

11. [cont'd from previous page]

"1. *Motions to suppress testimony*

Filed by:

Paul Marzullo
James McCloskey
Thomas Taylor

[cont'd on next page]

v. Sheriff, 437 Pa. 30, 261 A. 2d 586 (1970), the Pennsylvania Rules of Criminal Procedure now required a preliminary hearing in every criminal case. He therefore determined that the teaching of the recent decision of the United States Supreme Court in *Coleman v. Alabama*, 399 U. S. 1, 90 S. Ct. 1999 (1970) as well as considerations of equal protection and the defendants' right to counsel necessitated the indictments be quashed.

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11. [cont'd from previous page]

"2. *Motion to quash indictments as based on unconstitutional obtained testimony*

Filed by:
James McCloskey

"3. *Motions to quash indictments as defective for denial of a preliminary hearing*

Filed by:
Harry Blatstein
Paul Marzullo
McCloskey & Company, Inc.
James McCloskey
McCormick-Taylor Associates
H. H. Robertson Company
Thomas Taylor

"4. *Motions for change of venue* (withdrawn during argument)

Filed by:
Paul Marzullo
McCormick-Taylor Associates
Thomas Taylor

"5. *Motions for continuance until the Investigating Grand Jury is discharged*

Filed by:
Paul Marzullo
McCloskey & Company, Inc.

[cont'd on next page]

[540-7]

In a separate opinion dealing with defendant James McCloskey's petition to quash, Judge Spaeth ruled invalid an indictment based in part on testimony obtained in violation of a defendant's rights under the Fifth

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James McCloskey
H .H. Robertson Company
Thomas Taylor

"6. *Motions for continuance until the completion of the stadium*
Filed by:
Paul Marzullo
H. H. Robertson Company
Thomas Taylor

"7. *Motions for discovery and for production of scientific reports*
Filed by:
McCloskey & Company, Inc.
James McCloskey
McCormick-Taylor Associates

"8. *Motions for bill of particulars*
Filed by:
Harry Blatstein
Paul Marzullo
McCloskey & Company, Inc.
James McCloskey
Thomas Taylor

"9. *Motion for consolidation of all bills*
Filed by:
Commonwealth of Pennsylvania

"10. *Motions for severance*
Filed by:
Paul Marzullo
McCloskey & Company, Inc.
James McCloskey
H. H. Robertson Company
Thomas Taylor

"11. *Motions in re order of proof*
Filed by:
McCloskey & Company, Inc.
James McCloskey
H. H. Robertson Company

[cont'd on next page]

Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. In another separate opinion, Judge Spaeth directed that the testimony of defendants James McCloskey, Paul Marzullo and Thomas Taylor before the April, 1969, investigating grand jury be suppressed because their Sixth Amendment right to effective assistance of counsel at a critical stage had been denied. Finally, as noted above,[12] Judge Spaeth quashed the indictment with respect to Frank Steinberg.

The Commonwealth appealed these decisions to the Superior Court which affirmed them all without opinion by an equally divided court on September 25, 1970.[13] This consolidated appeal followed.[14]

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11. [cont'd from previous page]

"12. *Motions to quash superseded indictments*
Filed by:
McCloskey & Company, Inc.
James McCloskey
McCormick-Taylor Associates
Thomas Taylor

"13. *Motions for inspection of grand jury notes of testimony*
Filed by:
Harry Blatstein
Paul Marzullo
McCloskey & Company, Inc.
James McCloskey
H. H. Robertson Company
Thomas Taylor

"14. *Application for a blue ribbon jury*
Filed by:
Thomas Taylor"

12. See pp. 2-3 supra. The Steinberg indictment was not involved in Judge Spaeth's October, 1969, opinion. There was accordingly no change with respect to this appellee.

13. See note 1 supra.

14. See next page.

[540-9]

II. NECESSITY OF A PRELIMINARY HEARING.

a. Rules of Criminal Procedure.

Appellees urge that their indictments are invalid because they violate the Pennsylvania Rules of Criminal Procedure which, in their view, establish a comprehensive procedure for the institution of all criminal prosecutions.

Rule 102 provides that "[e]xcept as otherwise provided in these rules, all proceedings shall be initiated by a written complaint, sworn to or affirmed, and subscribed by affiant." [15] Rule 116 requires that a preliminary arraignment be held without "unnecessary delay" after an arrest,

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14. Meanwhile, the Commonwealth proceeded against defendants McCloskey and Company, Inc., McCormick-Taylor Associates, H. H. Robertson Company, Paul Marzullo, and James C. McCloskey by way of complaint, preliminary arraignment and preliminary hearing. Complaints were presented to the Municipal Court (Dandridge, J.).

A dispute arose as to whether the preliminary hearing should proceed before Judge Dandridge, as the district attorney desired, or before Judge Spaeth, as ordered by the late Hon. Vincent A. Carroll. Defendants petitioned this Court for a writ of prohibition, and on September 15, 1970, we issued a rule calling upon Judge Dandridge and President Judge Joseph R. Glancey of the Municipal Court of Philadelphia to show cause why the writ should not be granted. The rule issued without prejudice to preliminary hearings held in the meantime.

On September 23, 1970, we granted defendants' petition for a writ of prohibition, and the complaints were then transferred to Judge Spaeth for disposition.

On September 28, 1970, a pre-hearing conference was held. Upon motion of the district attorney and over defendants' objections, the court on November 30, 1970, continued the preliminary hearing, explaining in an accompanying opinion that it did not wish to take any action which might interfere with this Court's disposition of this appeal.

15. Rule 102 was subsequently amended effective May 1, 1970, to provide that a complaint is only one of several permissible methods of instituting criminal proceedings. However, the present appeal is governed by the former rules.

at which time the accused is entitled to a warning of his right to counsel and to bail, if he is accused of a bailable offense, as well as to his "right to have a preliminary hearing, or, except as provided in these rules, to waive it."[16] Rules 117 to 119 respectively deal with the nature and place of a preliminary hearing, the publicity and recording of the hearing, and the rights of parties at a preliminary hearing.

The issue, simply stated, is whether these Rules of Criminal Procedure have abrogated the power of a prosecuting official to submit an investigating grand jury presentment directly, with leave of court, to an indicting grand jury, a power which was a traditional and established exception to the normal procedure of instituting criminal proceedings by criminal complaint and preliminary hearing.[17]

As noted above, Rule 102 provided that all proceedings should be initiated by criminal complaint "[e]xcept as otherwise provided in these rules. . . ." The Commonwealth submits that Rule 212(c)'s definition of "presentment" as ". . . a formal accusation made by a grand jury, drafted by the Commonwealth's attorney with leave of court and submitted for action to a subsequent indicting grand jury," is such an exception to Rule 102.

In his October, 1969, opinion Judge Spaeth accepted the Commonwealth's view of the Rules. The principal reason for altering his view on this issue in the July, 1970, determination, was his reading of the opinion of this Court in *Commonwealth v. Rose* and *Commonwealth ex rel. Magaziner v. Sheriff*, supra.

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16. Rules 116, 117, 118, and 119 have likewise been revised.
17. See pp. 12-13 infra.

[540-11]

Initially we note that while Judge Spaeth may have been understandably misled by *Rose* and *Magaziner*, that decision is not determinative of the issue now before us. *Rose* and *Magaziner* involved situations where a trial judge in one case, and a habeas corpus hearing judge in the other sat as committing magistrates and summarily held defendants on charges of perjury, with no complaint having been issued or preliminary hearing having been held. No such situation is now before us.

No challenge to a grand jury presentment or the powers of a special investigating grand jury existed in *Rose* and *Magaziner*. Furthermore, the opinion's language concerning the Rules of Criminal Procedure stressed that the Rules applied to common pleas judges sitting as committing magistrates. The opinion was limited to that factual situation. This Court in no way there settled the question of whether the criminal rules pertaining to complaint and preliminary hearing superseded the other historical methods of commencing criminal prosecutions.

While the Rules are silent on special grand jury functions, we agree with the Commonwealth that Rule 212(c) provides a sufficient exception to Rule 102 to permit the interpretation we enunciate today.

Moreover, even in the absence of Rule 212(c), we would not infer that such silence was intended to abolish the traditionally sanctioned procedure by which a court-supervised investigating grand jury makes its presentment. It would be unreasonable to infer such a drastic alteration, as urged by appellees, from mere silence in rules dealing with more commonplace criminal proceedings. The Rules of Criminal Procedure at present simply do not concern themselves with this long established practice, nor do they foreclose any of

the other traditional exceptions [18] to proceeding by a preliminary hearing.

[540-12]

b. Constitutionality of an Investigating Grand Jury Presentment.

Several of the appellees here advance the argument that to deny them a preliminary hearing in contradistinction to defendants whose prosecutions began with complaints is an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment. A review and analysis of the traditional and historic methods for instituting criminal proceedings in this Commonwealth discloses that this contention is without merit.

In the overwhelming majority of cases a criminal action commences with the appropriate prosecuting official's filing of a complaint.[19] Preliminary arraignment and a preliminary hearing [20] follows. This procedure, which can certainly be viewed as the norm, admitted of exceptions in three general situations.

The first is where the district attorney or attorney general submits a bill to a grand jury without previous binding over or commitment of the accused. Such an exercise of official authority would be justified, for example, when the accused has fled or is about to flee the jurisdiction, and great haste is necessary. "The procedure in such cases, however, is under supervision of the court, and if the process and power is misapplied the court will vindicate itself in restraining its exercise." *Commonwealth v. Green,* 126 Pa. 531, 537, 17 Atl. 878, 879 (1889). Accord, *McNair's Petition,* 324 Pa. 48, 59-60, 187 Atl. 498, 503-04 (1936) and

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18. See pp. 12-13 infra.

cases cited therein. See also, *Commonwealth v. Coyle,* 415 Pa. 379, 396, 203 A. 2d 782, 790-91 (1964).

[540-13]

The second exception is when an indicting grand jury makes a presentment based on personal knowledge of the jurors without any bill of indictment having been laid before them. See *McNair's Petition,* supra at 60, 187 Atl. at 504; *Commonwealth v. Green,* supra at 537-38, 17 Atl. at 879. See generally 4 Wharton, Criminal Law and Procedure § 1710 (1957).

We are here concerned with the final exception—a prosecutor's submission of an investigating grand jury presentment to an indicting grand jury with leave of court. Appellees contend the recent decision of the United States Supreme Court in *Coleman v. Alabama,* supra, while not requiring a preliminary hearing as a matter of constitutional law, holds that if a preliminary hearing is granted it becomes a critical stage in the proceedings, and the accused is accordingly entitled to the assistance of counsel. They further assert that because *Coleman* emphasizes the critical nature of the preliminary hearing, a procedure whereby some criminal prosecutions are initiated by hearing and others by investigating grand jury presentments raises a serious question of equal protection, for in effect two types of defendants have been created: those entitled to a pre-

19. See generally, Address by the Hon. John C. Bell, District Attorney of Philadelphia, "The Several Modes of Instituting Criminal Proceedings in Pennsylvania," 13 Pa. Dist. Repts. 815 (1904).

20. It is interesting to note that preliminary hearings were unknown at early common law. They were created by statute and originated not as a means of protecting persons arrested for crime but rather as an instrument to restrict their indiscriminate release. For a thorough history of the

[cont'd on next page]

liminary hearing and those not entitled to such a proceeding. Appellees urge that such a classification is unreasonable and arbitrary because it permits a district attorney to create a classification at will, uninhibited by guidelines or restrictions.

We do not agree that these alternative modes of instituting criminal proceedings as they exist in this Commonwealth constitute an unreasonable classification. This Court has elsewhere summarized the origins of a grand jury's investigative powers, which have been recognized in this

[540-14]

Commonwealth since 1791.[21] It suffices to recall that while in some states a grand jury's inquisatorial capacity is vir-

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20. [cont'd from previous page]
development of preliminary hearings in both England and this Commonwealth, see *Commonwealth v. O'Brien*, 181 Pa. Superior Ct. 382, 387-97, 124 A. 2d 666, 669-73 (1956).

21. See generally, *Hamilton's Appeal*, 407 Pa. 366, 383-86, 180 A. 2d 782, 790-91 (1962) (dissenting opinion); *McNair's Petition*, 324 Pa. 48, 56 n. 1, 187 Atl. 498, 502 n. 1 (1936).

Although the origins of the grand jury continue to be obscure, compare *McNair's Petition*, supra (Norman or Anglo-Saxon) with Whyte, Is the Grand Jury Necessary, 45 Va. L. Rev. 461, 462-63 (1959) (Greco-Roman or Scandinavian), there is general agreement that the institution first became formalized in England in 1162 by the Assize of Clarendon. See generally, Edwards, The Grand Jury 1-44 (1906); Plucknett, A Concise History of the Common Law, 16-19, 86-88, 102-21 (3d ed. 1940); 1 Pollock & Maitland, The History of the English Law 136-53, 598-662 (2d ed. 1903); Stephen, A History of the Criminal Law of England 184-86, 250-58 (1883).

The assize was a body of laymen who were to report persons accused of robbery and other crimes to the royal sheriff. Their deliberations were open, and their purpose was to further the interest of the crown.

Then, in the seventeenth century, the grand jury became a protector of the individual against the crown. The single most significant manifestation of this change was the Earl of Shaftesbury's Trial, 8 How. St. Tr. 759 (1681) where the jurors requested and were permitted to question the witnesses in private. They then refused to indict. See 8 Wigmore on Evidence, § 2360 (1961); see

tually unlimited,[22] in Pennsylvania the freedom of the grand jury to investigate has been severely restricted. Hence we believe any fears of arbitrary action by district attorneys in this area are not supported by either the decisional law or the requisite procedure.

One of the earliest and most comprehensive discussions of a grand jury was *Lloyd & Carpenter's Case*, 5 Pa. L. J. 55, 3 Clark 188 (Ct. of Qtr.
[540-15]
Sess. of Phila. 1845), cited with approval by this Court on many occasions.[23] After commenting on the other two extraordinary modes of procedure,[24] Judge King there observed that an investigating grand jury is justified where criminal courts direct the investigation of:

> ". . . matters of general public import, which, from their nature and operation in the entire community, justify such intervention. The action of the courts

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generally Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 456-58 (1965). The function of protecting the individual from indiscriminate prosecution remains the foremost duty of the grand jury today.

The origins of the grand jury's investigative powers are equally uncertain. See Dession and Cohen, The Inquisatorial Functions of Grand Juries, 41 Yale L. J. 687 (1932); Segal, Spivack and Costilo, Obtaining a Grand Jury Investigation in Pennsylvania, 35 Temp. L. Q. 73, 75 (1961). Yet, its inquisatorial powers were clearly established in this Commonwealth by 1791. See *McNair's Petition*, supra at 57, 187 Atl. at 503.

22. See *McNair's Petition*, supra at 57-58, 187 Atl. at 503. See generaly Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play? 55 Col. L. Rev. 1103 (1955); Note, The Grand Jury as an Investigatory

22. [cont'd from previous page]
Body, 74 Harv. L. Rev. 590 (1961); Note, Discretionary Power in the Judiciary to Organize a Special Investigating Grand Jury, 111 U. Pa. L. Rev. 954 (1963).

23. See, e.g., *Special Grand Jury Case*, 397 Pa. 254, 256, 154 A. 2d 592, 594 (1959); *McNair's Petition*, supra at 58, 187 Atl. at 503.

24. See discussion supra pp. 12-13.

on such occasions, rather bear on things than persons; the object being the suppression of general and public evils, affecting in their influence and operation communities rather than individuals and therefore, more properly the subject of general than special complaint. Such as great riots that shake the social fabric, carrying terror and dismay among the citizens; general public nuisances affecting the public health and comfort; multiplied and flagrant vices tending to debauch and corrupt the public morals, and the like. In such cases the courts may properly, in aid of inquiries directed by them, summon, swear, and send before the grand jury, such witnesses as they may deem necessary to a full investigation of the evils intimated, in order to enable the grand jury to present the offence and the offenders. But this course is never adopted in case of ordinary crimes, charged against individuals. Because it would involve, to a certain extent, the expression of

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opinion by anticipation, on facts subsequently to come before the courts for direct judgment; and because such cases present none of those urgent necessities which authorize a departure from the ordinary course of justice. In directing any of these investigations, *the court* act [sic] under their official responsibilities, and must answer for any step taken, not justified by the proper exercise of a sound judicial discretion.''

Id. at 58-59, 3 Clark at 192 (emphasis added).

We have stressed with regard to a grand jury's investigative function that ''. . . '. . . this power, which is a most delicate one, is never exercised unless under

urgent necessity or . . . [where] the public would suffer from delays incident to ordinary forms of law.' " *McNair's Petition,* supra at 60, 187 Atl. at 504 (brackets in original) (citations omitted). Such concerns were the prime motivation underlying the historic requirement in Pennsylvania that *a court* be placed in charge of a special investigating grand jury to regulate the scope of inquiry, by, for example, administering the oath to the witnesses and receiving objections.[25]

A court will first scrutinize the prosecuting official's petition for summoning the jury. See, e.g., *In re Grand Jury Investigation of Registration Commission,* etc., 22 Pa. D. & C. 2d 285 (1960); *District Attorney's Petition,* 50 Pa. C. C. 347 (1921); *In re Alleged Extortion Cases,* 29 Pa. C. C. 538 (1904).

The court's decision to proceed with, as well as its overseeing of the investigation is subject to the review of this Court through the recognized procedure of applying for a writ of prohibition to prevent an

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alleged improper exercise of power or an abuse of discretion by the supervising court. See *Hamilton Appeal,* 407 Pa. 366, 180 A. 2d 782 (1962). We have not hesitated to issue a writ of prohibition in cases where evidence did not indicate a special grand jury was necessary. Compare *Philadelphia County Grand Jury Investigation Case,* 347 Pa. 316, 32 A. 2d 199 (1943) (writ of prohibition issued) and *McNair's Petition,* supra (writ of prohibition issued) with *Dauphin County Grand Jury Investigation (No. 1),* 332 Pa. 289, 2 A. 2d 298, 783 (1938) (investigation approved) and

25. The foreman of an investigating grand jury does not have the power to administer the oath. See *Commonwealth v. Hubbs,* 137 Pa. Superior Ct. 229, 8 A. 2d 611 (1939).

Shenkar v. Harr, 332 Pa. 382, 2 A. 2d (1938) (investigation approved). See generally *Hamilton Appeal,* supra at 376-81, 180 A. 2d at 787-89 (1962) (appendix attached to concurring opinion listing Pennsylvania grand jury cases).

Moreover, we note that a writ of prohibition is not the only method by which our Court will review the propriety of the convening and functioning of an investigating grand jury. A convicted defendant who believes he has been aggrieved by any illegal actions of the investigating grand jury could obtain appropriate appellate review in his appeal from judgment of sentence.

In *McNair's Petition* we set forth some of the more crucial requirements surrounding the approval of a grand jury investigation:

> "A grand jury investigation, because of the gravity of the undertaking, must have a definite purpose to discover criminal acts which seriously affect or injure the public generally, which effect, if permitted to continue, would endanger public safety . . . or health, demoralize the personal security of members of the public, or permit systematic criminal depredations by public officers . . . . Such matters require immediate attention so that these evils may be suppressed. The criminal acts subject to investigation must be such that the ordinary process of the law is inadequate to cope with or discover them. . . .

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> "A grand jury's investigation cannot be a blanket inquiry to bring to light supposed grievances or wrongs for the purpose of criticizing an officer or a department of government, nor may it be instituted without direct knowledge or knowledge gained from trustworthy in-

formation that criminal conspiracy, systematic violations of the law or other criminal acts of a widespread nature prevail, and at least one or more cognate offenses should exist on which to base a general investigation. The investigation cannot be aimed at individuals primarily, as such, nor at the commission of ordinary crimes . . . but should be of matters or criminal nature wherein public officers or the interests of the general public are involved.

"Where it is made to appear to a court, as above indicated, that there exists a system of crime among public officers, or criminal conspiracies respecting public business, safety or health, or other criminal acts affecting these functions of a widespread nature, jeopardizing or demoralizing public security or health, the judge may properly order such investigation.

"Investigations for purely speculative purposes are odious and oppressive and should not be tolerated by law. . . . The grand jury must know what crimes it is to investigate. The court of quarter sessions has no power to set such an inquiry in motion unless it has reasonable cause to believe that an investigation will disclose some criminal misconduct which is within its jurisdiction to punish.

"The grand jury must not be set upon fruitless searches, founded upon mere rumor, suspicion or conjecture. These are proper matters for police investigation. Before reflection

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is cast upon the integrity of public officials a preliminary investigation by the forces of law charged with

> the discovery of crime should be made to determine whether there is any real foundation. Such jury investigations involve great expense to the public; subject the citizen to inconvenience and frequently interfere with the normal functioning of public officials and bodies brought before it. They throw a cloud of suspicion upon the parties subject to attack and undermine public confidence in them. There must be a sound, solid basis on which to proceed."

Id. at 60-62, 187 Atl. at 504-05 (footnote and citations omitted).

Having reviewed in depth the nature and characteristics of an investigating grand jury, we believe it serves identifiable and legitimate state interests. We cannot agree that the omission of a preliminary hearing for a defendant indicted pursuant to a presentment, when the extraordinary and limited circumstances[26] justifying the impaneling of an investigating grand jury existed, in any way prejudices him, or denies him a greater degree of protection than is available to a defendant in a criminal proceeding instituted by complaint and preliminary hearing. In comparing the safeguards afforded by these alternative procedures, we must turn again to the Rules of Criminal Procedure.

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26. It has been suggested that the minimum requisites for obtaining a grand jury investigation are: a) the subject matter of the investigation must affect the members of the community as a whole, rather than as individuals; b) the investigation must be aimed at conditions and not primarily at individuals; c) the ordinary processes of the law must be inadequate to cope with the problems; d) the investigation must have a defined scope, be aimed at crimes, and supported by information indicating the existence of a system of related crimes or a widespread conspiracy; e) information as to the crimes must come from direct knowledge or a trustworthy source. See Segal, Spivack, and Costilo, supra note 21 at 79.

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Rule 119[27] lists four rights of an accused at a preliminary hearing: assistance of counsel, cross-examination of witnesses and inspection of physical evidence, giving of testimony, and recording the proceedings at his own expense.

We deal with the right to counsel in Section III of this opinion and accordingly defer a discussion of that subject.

As to recording the proceedings, a record was made of the special grand jury investigation here involved. Each witness is entitled to his own testimony. Furthermore, should any of the other evidence before the investigating grand jury be material to the impeachment of Commonwealth witnesses at trial, we will not presuppose that the trial court would not adequately protect any rights a defendant might have to utilize such evidence.[28]

Likewise, the other preliminary hearing advantages allegedly denied defendants are illusory. In *Commonwealth v. Dessus,* 423 Pa. 177, 181, 224 A. 2d 188, 191 (1966), we held that an indictment based solely on hearsay testimony was valid. That being the case, an accused's opportunity to cross-examine at a preliminary hearing is severely restricted. We believe that the policy considerations justifying the impaneling of a special investigating grand jury when ordinary law enforcement procedures are no longer capable of dealing with the problem as outlined above justifies this "curtailment", if indeed it is one, of an accused's cross-examination opportunity. Cf. *California v. Green,* — U. S. —, 90 S. Ct. 1930 (1970).

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27. Rule 120 of the new Rules. It is not without interest that the rules pertaining to preliminary arraignment and preliminary hearing mention that these procedures occur after *an arrest.* To our knowledge, no arrest has occurred in the instant cases.

28. Cf. *Pittsburgh Plate Glass Co. v. U. S.,* 360 U. S. 395, 79 S. Ct. 1237 (1959); see generally, Calkins, supra note 21 at 476-85.

Additionally, in view of the limited quantum of evidence necessary to bind a defendant over, and a defendant's opportunity to testify on his own behalf, we believe any disclosure benefits available to a defendant in a preliminary hearing through the availability of inspecting the minimum if any, amount of physical evidence introduced by the Commonwealth are more than adequately balanced in the context of an indictment arising out of a grand jury investigation. In the latter situation, a defendant has the entire presentment as a basis upon which to prepare for trial as well as the right to request a bill of particulars under Rule 221. As the record now before us discloses, a presentment is a rather complete summary of the grounds on which the investigating grand jury is making its recommendation, and includes descriptions of both the physical evidence and testimony that prompts its action.

It has been urged by various appellees that the proper procedure required by both the criminal rules and considerations of equal protection is that subsequent to the investigating grand jury presentment, a complaint should be issued and preliminary hearing held before the matter is submitted to an indicting grand jury. To accede to appellees' request would merely be subjecting the administration of criminal justice to another superfluous layer of delay and imposing an unwise burden upon our judicial process as well as upon the prosecutor and counsel for the defense with only a slight expectation for what at most would be a highly speculative *de minimus* advantage to an accused.

We reiterate that an investigating grand jury is an arm of the court, in this Commonwealth is judicially supervised from its inception contrary to the practice in most jurisdictions, and is strictly regulated in the scope of its inquiry.

The rights of an accused will certainly be as well protected before an investigating grand jury as during a preliminary hearing. Both are conducted before persons not necessarily schooled in the law, and hearsay evidence can serve as the basis for the presentment as well as the binding over at a preliminary hearing. At least in the investigating grand jury context, the procedure is subject

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to supervision by a court.

Finally, we do not view *Coleman v. Alabama,* supra, as compelling a different result. *Coleman* did not decide that a preliminary hearing was constitutionally required; it held that when an accused has a preliminary hearing, he is entitled to counsel. This Court has ruled *Coleman* to be nonretroactive in *Commonwealth v. James,* 440 Pa. 205, 269 A. 2d 898 (1970). Moreover, *Coleman* made clear that appellate review of the denial of counsel at a preliminary hearing was subject to the harmless error test of *Chapman v. California,* 386 U. S. 18, 87 S. Ct. 824 (1967). — U. S. at —, 90 S. Ct. at 2004. As will appear more fully below, we apply an analogous test, for relief is denied only to those appellees now before us whose indictments were not based in part on self-incriminatory statements made before the investigating grand jury without sufficient warning from the court.

In sum, an investigating grand jury presentment is a constitutionally permissible and reasonable alternative to a preliminary hearing. We turn now to a witness's right to the assistance of counsel and privilege against self incrimination during his appearance before an investigating grand jury.

III. RIGHT TO COUNSEL AND RIGHT AGAINST SELF INCRIMINATION BEFORE AN INVESTIGATING GRAND JURY.

When the five individual appellees were subpoened to testify before the April, 1969, investigating grand jury, each requested the court (Sloane, J.) that he be permitted to have counsel with him in the grand jury room, or in the alternative that he be allowed to consult with counsel at will outside the door. These motions were properly refused. The court then instructed defendants as to their duties as witnesses.

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The relevant portions of these instructions are set forth in the margin.[29]

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29. The record in this appeal reveals the following:

To Mr. McCloskey:

"THE COURT: Now, here, too, gentlemen, you are represented by very able counsel, Mr. Gittis. You have a right, each of you—both of you—to talk to Mr. Gittis before you go into the Grand Jury room, and you confide in Mr. Gittis after you come out—but with nobody else—not even your wives.

* * * * *

"I have said you have able counsel. You may consult with him or his associate before you go into the Grand Jury room, and after you come out, but not while you are there."

To Mr. Marzullo:

"THE COURT: Mr. Marzullo, I will tell you what, most likely, you just heard when I said it to Mr. Breen. And that is, you certainly have a right to have a lawyer—and you have one, and a good one. You have a right to consult with him before you go into the Grand Jury room, and have questions presented to you and answers made, as indicated by the oath I have just given you. You may tell your lawyer—and nobody else—on the basis of the great tradition of the lawyer-client relationship—what went on in the Grand Jury room—but no one else. And that includes your wife.

"You may not have a lawyer with you while you are in the Grand Jury room."

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In his July, 1970, opinions, Judge Spaeth ruled that appellees were entitled under the Fifth and Sixth Amendments to consult with their lawyers outside the grand jury room during their testimony. He based his ruling on the United States Supreme Court decisions in *Miranda v. Arizona,* 384 U. S. 436, 86 S. Ct. 1602 (1966) and *Escobedo v. Illinois,* 378 U. S. 902, 84 S. Ct. 1758 (1964), as well as the decision of the New York Court of Appeals in *People v. Ianniello,* 21 N. Y. 2d 418, 235 N. E. 2d 439, cert. denied, 393 U. S. 827, 89 S. Ct. 90 (1968). We cannot agree.

Neither *Escobedo* nor *Miranda* were even remotely concerned with right to counsel before an investigating grand jury. The interpretation urged by appellees that counsel be accessible at all times during a witness's appearance is an unwarranted extension of the teaching of those decisions.

To Mr. Taylor:

"THE COURT: * * *

"As you may have heard, each one of you has the right to consult a lawyer, counsel, before you go into the Grand Jury room, and to confide in that same counsel after you come out. You may not confide in anyone else excepting your lawyer—not even your wife. I say 'wife' because generally she is the most intimate person that a man knows—when he is married. Otherwise, everything is secret, under the law, under the Grand Jury proceeding."

To Mr. Blatstein:

"THE COURT: * * *

"As you know, Mr. Blatstein, you may consult with your counsel, Mr. Richter, before you go into the grand jury room. And you may confide in Mr. Richter when you come out of the grand jury room. *While you are in the Grand jury room, you are in there alone. If there is any problem or question, it will be brought before the court.*"
(Emphasis added.)

Mr. Steinberg was administered the oath without any cautionary instructions.

As to *Ianniello,* we believe it supports the result we reach today, as appears more fully below.

In *In re Groban's Petition,* 352 U. S. 330, 77 S. Ct. 510 (1957), the last pronouncement by the Supreme Court directly on this issue, it was held that ". . . [a] witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel . . . . When . . . charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense." Id. at 333, 77 S. Ct. at 513.

It would be a serious interruption and impair continuity in a grand jury investigation if witnesses were permitted to leave the room and consult with counsel prior to responding to every question.

However, in *In re Groban's Petition,* supra, the Supreme Court also stressed that a witness before a grand jury is always protected by the

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privilege against self incrimination, ". . . a privilege available *in investigations as well as in prosecutions.*" Id. at 333, 77 S. Ct. at 513 (emphasis added). See generally, Annot., Self Incrimination Before a Grand Jury, 38 A. L. R. 2d 229 (1954).

In seeking to balance society's interest in the grand jury's freedom of orderly inquiry and a witness's right to exercise his privilege against self incrimination knowingly and intelligently, we believe that proper procedure is for the court supervising the investigating grand jury to instruct a witness when administering the oath that while he may consult with counsel prior to and after his appearance, he cannot consult with counsel while he is giving testimony. However, the witness should also be informed that should a problem arise while he is being interrogated, or should he

be doubtful as to whether he can properly refuse to answer a particular question, the witness can come before the court accompanied by counsel and obtain a ruling as to whether he should answer the question.

Such a warning gives full recognition to the delicate position of a witness before an investigating grand jury.[30] He has been summoned to testify, and he is subject to contempt proceedings should he refuse to testify without justification.[31] The question of when a witness has "reasonable cause to apprehend danger" and hence can exercise his right against self incrimination is not always clear.[32] As was stated in *Jones v. United States,* 342 F. 2d 863 (D. C. Cir. 1964).

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> "If . . . [a witness] answers incriminating questions he may make certain, as Short did, that he will be indicted. And testimony before the grand jury may be used, though Short's was not, to impeach his testimony at trial. If he refuses to testify at all, or to answer some questions on the ground that answers might incriminate him, the grand jury may draw conclusions. If he refuses to answer questions that are not incriminating, he may be guilty of contempt."

Id. at 868 (Edgerton, J., joined by Bazelon, C. J., and Fahy and Wright, J. J.).[33]

Determining what is an incriminating statement is not always clear to a layman. We thus conclude that a sub-

30. See generally, Meshbesher, Right to Counsel Before Grand Jury, 41 F. R. D. 189 (1967).

31. See, e.g., *United States v. Testa,* 326 F. 2d 730 (3d Cir. 1963), cert. denied, 376 U. S. 931, 84 S. Ct. 701 (1964).

32. See *Malloy v. Hogan,* 378 U. S. 1, 84 S. Ct. 1489 (1964).

33. The quoted portion of the opinion, although included in the opinion of the court, was in a section joined in only by four members of the court, which was not a majority.

poenaed witness who has given testimony before an investigating grand jury without the above warning has been denied his right against self incrimination.

As noted above, appellees urge that the New York Court of Appeals decision in *People v. Ianniello,* supra, is persuasive authority for the proposition that a witness before an investigating grand jury be allowed to consult with his attorney outside the hearing room after each question. Having examined that decision we find, to the contrary, that it supports the result we reach today.

The holding of that decision was that Ianniello in fact had not been deprived of any right to consult with his lawyer. See 21 N. Y. 2d at —, 235 N. E. 2d at 441. Judge Brietel then observed that "[*c*]*ourts* have a particular responsibility to prevent unfairness in Grand Jury proceedings, for the Grand Jury is an 'arm of the court' ". Id. at —,

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235 N. E. 2d at 443 (emphasis added). The court further pertinently noted that if a witness is told he cannot see his lawyer,

> ". . . he does not have license to commit perjury or contempt. Rather, he must persist in his refusal to answer, thus forcing the prosecutor to take the matter into open court for a ruling. By requiring the matter to be taken to the presiding Justice, the proceeding is expedited and the danger of stalling tactics reduced. The judge can rule on questions of pertinency, after argument of counsel. He can determine whether a colorable claim of testimonial privilege is presented, and can inform the defendant of the extent of his immunity from prosecution for prior offenses. Where a

> witness persists in raising objections which are palpably not in good faith, the judge may compel him to desist from this course under the sanctions of contempt proceedings."

Id. at —, 235 N. E. 2d at 443-44.

We reiterate our belief that to allow a witness to leave the grand jury room and consult with his attorney at the door prior to responding to every question would cause undue delay and all but terminate the institution of the investigating grand jury. Such a procedure, which would not be subject to any court supervision, would be an invitation to evasive and stalling tactics. The standards we today institute are manifestly distinguishable in that they require a court to scrutinize the witness's refusal to answer. If the witness persists in interrupting the grand jury proceedings in palpable bad faith and without presenting any colorable claim of testimonial privilege, the court can bring a halt to such tactics. This essential element of judicial supervision would not be available were a witness permitted at will to consult with his attorney for an indefinite period of time after every question, no matter how unmeritorious his objection.

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Consequently, we must now consider the proper remedy.[34]

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34. The Commonwealth raised the argument that Judge Spaeth, being a court of coordinate jurisdiction, was without power to "overrule" Judge Sloane on the question of preliminary hearings and right to counsel. The cases were assigned to Judge Spaeth for all pre-trial motions. The preliminary hearing issue was never presented to Judge Sloane, for no presentments or indictments had yet been made. Furthermore, the factual contexts were distinct and the records and posture of the cases were totally different.

IV. THE PROPER REMEDY.

Even though a witness was not given the proper warning, we would not disturb a later indictment unless the presentment and subsequent indictment were based, in part, on the self-incriminatory testimony of the defendant.

[540-28]

In the present case, appellee Blatstein received the proper warning.[35] As to appellee Steinberg, although the record does not indicate whether he was advised he could come before the court during his testimony, our review of the second presentment discloses that it is not based on any testimony that appellee Steinberg might have given,[36] but rather on the records of the Philadelphia Housing Authority, produced under subpoena, evidence submitted by the district attorney's office, and the testimony of Hope B. Winborne, Chief of Construction of the Department of Licenses. Consequently, neither of these appellees is entitled to relief.

However, appellees Thomas Taylor, Paul J. Marzullo, and James C. McCloskey were all given an insufficient warning, and their indictments were based on the fourth presentment of the investigating grand jury. Our examination of that presentment discloses that the recommendations concerning each of these appellees were clearly based in part on their incriminating testimony before the investigating grand jury. We therefore conclude that their indictments must be quashed and their testimony suppressed.

The Commonwealth refers us to this Court's decision in *Commonwealth v. Dessus,* supra, and argues that even

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35. See note 29, supra.

36. The record discloses that Steinberg respectfully declined to give any testimony before the April, 1969, investigating grand jury, other than his name and address.

if some irregularity existed in the procurement of the indictments, to quash is not the proper remedy.

This Court has made it clear that in certain circumstances, a constitutional violation in securing the indictment will necessitate that the indictment be quashed. In *Commonwealth v. Kilgallen*, 379 Pa. 315, 108 A. 2d 780 (1959), we held that where a witness appeared before the

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grand jury, testified under judicial compulsion in violation of his rights pursuant to the Fifth Amendment and Article I, Section 9 of the Pennsylvania Constitution against self incrimination, his indictment should be quashed. Mr. Justice Chidsey there stated for six members of the Court that:

> "It is true, as stated by the Superior Court in the *Gross* case, that '. . . Proof that a grand jury heard irrelevant testimony, Com. v. Spallone, 154 Pa. Superior Ct. 290, 35 A. 2d 731; or hearsay evidence, Com. v. Stoner, 70 Pa. Superior Ct. 365, affirmed 265 Pa. 139, 108 A. 624; or incompetent witnesses, Com. v. Padden, 160 Pa. Superior Ct. 269, 50 A. 2d 722, will not invalidate an indictment where other proper evidence was adduced before it . . .'. *But we know of no case in this jurisdiction that denies the right to challenge the validity of an indictment on the ground of violation of the accused's constitutional rights here asserted*—and so challenge successfully upon proper and sufficient proof."

Id. at 325-26, 108 A. 2d at 785 (emphasis added).

The principle of *Kilgallen* is still valid and dictates our result today on this issue. Defendants McCloskey, Taylor and Marzullo were on notice that the investigating grand

jury was inquiring into the stadium project. They were judicially compelled to testify without sufficient warning or protection concerning their right against self incrimination. The resulting presentment and indictments were based in part on this constitutionally impermissible testimony, and hence must be quashed.

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V. CONCLUSION.

Accordingly, for the reasons set forth above: the orders of the Superior Court affirming the orders of the Philadelphia Court of Common Pleas of July 27, 1970, quashing the indictments against Harry Blatstein, Frank M. Steinberg, McCormick-Taylor Associates, McCloskey & Company, Inc., and H. H. Robertson Company are reversed and the records remanded for further proceedings; the orders of the Superior Court affirming the orders of the Philadelphia Court of Common Pleas of July 27, 1970, quashing indictments and suppressing evidence against James C. McCloskey, Paul J. Marzull , and Thomas Taylor are affirmed.

Mr. Justice Eagen filed a concurring and dissenting opinion in which Mr. Justice Jones joins.

Mr. Justice Cohen did not participate in the decision of this case.

CONCURRING AND DISSENTING OPINION OF JUSTICES EAGEN AND JONES OF THE SUPREME COURT OF PENNSYLVANIA.

[540]

IN THE

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 157 JANUARY TERM, 1971.

APPEALS FROM ORDERS DATED SEPTEMBER 25, 1970, OF SUPERIOR COURT AS OF OCTOBER TERM, NOS. 1377 TO 1384.

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

JAMES McCLOSKEY, HARRY BLATSTEIN, McCORMICK TAYLOR ASSOCIATES, H. H. ROBERTSON COMPANY, PAUL MARZULLO, FRANK M. STEINBERG, THOMAS TAYLOR, McCLOSKEY & COMPANY, INC.

CONCURRING AND DISSENTING OPINION.

EAGEN, *J.* Filed: May 13, 1971

I agree with the conclusion of the majority that the denial of a preliminary hearing to the individuals and corporations indicted in this case violated neither the Pennsylvania Rules of Criminal Procedure nor constitutional due process. However, I strongly disagree with the majority's ruling that an individual who is compelled to appear and testify before a grand jury may constitutionally be denied the opportunity of consulting with his legal counsel outside the grand jury room during his testimony. I agree completely with Judge Spaeth in the court of original

jurisdiction that such a denial violates the individual's rights guaranteed by the Fifth and Sixth Amendments.

A person accused of crime must be afforded the assistance of counsel during every "critical stage" in the prose-

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cution process. Admittedly a witness before a grand jury is not an "accused" in a technical sense. However, the law should consider the realities of the situation and a reading of the limited record before us is convincing to me that the individuals here involved were "accused" in a very real sense when they testified before the grand jury. Moreover, they were at least potential defendants; their testimony was compelled and eventually they were indicted at least in part on what they themselves were compelled to disclose. Under such circumstances, they were entitled to the minimum protection of having the opportunity of consultation with counsel before answering any questions.

Additionally, a witness before a grand jury need not answer any incriminating questions. Resolution of the scope of the privilege against self-incrimination and the applicability of the waiver doctrine on a question-by-question basis frequently presents a difficult problem. I cannot see how an untrained layman can be expected to possibly discern whether or not an answer to a particular question will subject him to the danger of incrimination. To deny him the opportunity of adequate consultation with his counsel is to render his right under the Fifth Amendment meaningless.

Aside from every other consideration, fundamental fairness, which is the cornerstone of due process, mandates that the opportunity of such assistance be afforded. The secret proceeding before a grand jury is pregnant with the

possibility of coercion, intimidation and overreaching. One commentator pointedly described the situation thusly:

[540-3]

> "A potential defendant who is brought before the Grand Jury without an attorney at his side is almost helpless. He is faced with a barrage of questions, often improper in the normal judicial setting, thrown at him by a group of reasonably intelligent citizens excited at the prospect of playing both lawyer and detective. This torrent of interrogation is, of course, directed by a skilled prosecutor capable of utilizing the Grand Jury as the tool to obtain incriminating evidence from the mouth of a nervous witness. The upset and confused witness does not know whether to respond to the questions and risk having his answers used against him at a trial or claim the Fifth Amendment, creating suspicion in the eyes of the jurors and risking a contempt charge. In this atmosphere, the proceeding takes on the attributes of a Star Chamber. There is no comparable institution in our entire society which sanctions secret interrogation of a person 'legally' denied access to counsel." Meshbesher, *Right to Counsel Before Grand Jury,* 41 F. R. D. 189, 190 (1966).

(1966).

Finally, an inconsistency in the reasoning of the majority opinion must be noted. On the one hand, the opinion states that if a witness were permitted to leave the grand jury room to consult with counsel this "would be a serious interruption and impair continuity in a grand jury investigation." But in the next breath the opinion states that if a witness is confronted with a question which tends toward incrimination he may "come before the court

and obtain a ruling as to whether or not he should answer the question." Apparently in the minds of the majority the last mentioned procedure would not constitute a "serious interruption" of the grand jury investigation.

In this connection may I also say that, while I agree that courts and their agencies should persistently strive
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towards the objective of increased efficiency, such efficiency should always be within legal limits and "should never be made the end goal of a system dealing with life and liberty."

Mr. Justice Jones joins in this opinion.

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IN THE

Supreme Court of the United States

October Term, 1971.

Nos. 71-153 and 71-201.

McCLOSKEY & CO., INC. and McCORMICK-TAYLOR ASSOCIATES,
in No. 71-201,

Petitioners,

FRANK M. STEINBERG,
in No. 71-153,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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JAMES D. CRAWFORD,
Deputy District Attorney,
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STATEMENT OF THE CASE.

The Court of Common Pleas of Philadelphia quashed indictments against these petitioners on the ground that they had been denied preliminary hearings required by Rule 116 of the Pennsylvania Rules of Criminal Procedure. The Court consciously avoided the equal protection question by holding petitioners entitled to preliminary hearings as a matter of state law. The Pennsylvania Supreme Court reversed that state law decision and also observed that the historical classification of methods of instituting criminal proceedings in Pennsylvania, which allows indictment without preliminary hearings, *inter alia,* in cases where the presentment of an investigating grand jury detailing the evidence and naming the witnesses,[1] is approved by the convening court for submission to an indicting grand jury, is a reasonable classification.

Analyzing the reasons for the classification and its historical application, the Pennsylvania Supreme Court concluded that there was a rational basis for the distinction drawn and uniformly applied. That court also considered the actual effects of the different procedures on the ability of an accused to prepare his defense and found the advantage of a preliminary hearing illusory by comparison. It remanded the cases for disposition of other undecided pre-trial motions and trial. At that point these petitions were filed.

There is presently pending before this Court, in addition to the present petition, a petition of the Commonwealth of Pennsylvania in *Pennsylvania v. James C. McCloskey, Paul J. Marzullo and Thomas Taylor* as of October Term, 1971, No. 71-374, to which petition answers have been filed in this Court.

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[1] "As the record now before us discloses, a presentment is a rather complete summary of the grounds on which the investigating grand jury making its recommendation, and contains descriptions of both the physical evidence and the testimony which prompts its action." Pa. Supreme Court Opinion, p. 21, McCloskey petition, page 66.

REASONS FOR NOT GRANTING THE WRIT.

1. The Nature of the Investigating Grand Jury.

The Philadelphia investigating grand jury of March Term, 1969 sat for seventeen months, heard over four hundred witnesses; produced fifteen presentments which generated over 2,400 indictments against forty-six individuals and nineteen firms, including city officials and others doing business with the City on a wide variety of charges. Some of these cases have been tried, others are pending. This grand jury had investigating functions only; it did not indict. No investigating grand jury acting under the law of Pennsylvania may return an indictment.

Before a presentment is returned by such a Pennsylvania grand jury, a majority of its twenty-three members must find "probable cause" to recommend indictment. This is the same standard applied by the judge at a preliminary hearing. The grand jury hears testimony under oath in order to make its findings. It is controlled actually by the Court of Common Pleas, not by the prosecutor. It calls its witnesses as it chooses, not at the choice of the district attorney. All witnesses are sworn by the Court and as the opinion below makes clear, must be protected by the Court.

The presentments which form the basis of the indictments are replete with detail, unlike some earlier precedents from Pennsylvania precedents (see *Commonwealth v. Kilgallen*, 379 Pa. 315, 108 A. 2d 780 (1959)) and other jurisdictions where only conclusions or sketchy details are supplied and names of witnesses, for example, withheld. The variations of these substitute pre-trial vehicles serves to vary the impact of the denial of preliminary hearing, limit the precedential value of any decision of this Court and make the issues less clear than that baldly stated in the petitions.

2. The Reasons for the Classification.

The Pennsylvania requirements for impaneling an investigating grand jury, stressed by the court below in judging the reasonableness of the classification involved, make it clear that this is not a mere prosecutor's option in Pennsylvania, unlike other jurisdictions including the federal. See also *Coleman v. Alabama,* 399 U. S. 1 (1970). Such grand juries may be convened by the court only on a showing of widespread public wrongdoing, seriously jeopardizing public safety administration and confidence, and not susceptible to remedy by ordinary law enforcement procedures. This undeniably important state interest applies not only to the use of the investigating grand jury to gather evidence but also to the sequel of avoiding preliminary hearing before local magistrates or justices of the peace in cases so developed because of the very fact that such investigations impinge upon the operations of local government almost as their exclusive target.

Under the investigating grand jury circumstances, to require the Commonwealth to reexamine the same witnesses (some four hundred in this grand jury's investigations), at preliminary hearings would extend the pre-trial proceedings unduly without compensating benefit to the defendants in view of the fully detailed presentments and pre-trial discovery available. This represents not only a legitimate state interest but a plainly reasonable distinction between these and ordinary prosecutions. See *Dandridge v. Williams,* 397 U. S. 471 (1970).

In the run-of-the-mill criminal case, the prosecution is begun on the ex parte affidavit of an interested party, the alleged victim, or a policeman whose information is largely hearsay. In such cases, the Pennsylvania rules require a preliminary hearing (unless the court allows an exception because the statute is about to run or the defendant is a fugitive). But this is a far cry from the detailed recital of

evidence based on sworn testimony and documents, finding probable cause on the oath of a majority of twenty-three grand jurors, then approved by the convening court which has the power to review the grand jury's transcript.

3. The Pre-Trial Posture of the Case.

The procedural point at which this decision occurs indicates its lack of finality in this litigation. Other pending motions[2] and trial may yet dispose of these cases on non-federal grounds and make this Court's intervention unnecessary, even at the conclusion of the trials. The pre-trial posture also makes it impossible to assess the actual impact of the absence of preliminary hearing upon the potential trial.

The opinions of a majority of this Court in *Coleman v. Alabama, supra,* indicated the appropriateness of such pragmatic testing in determining the denial of counsel-equal protection question in that case, but this record only brings the cases to indictment. Post indictment discovery procedures under the Pennsylvania rules and their application to cases in which no preliminary hearing is held are an uncharted area in Pennsylvania law.[3] The future of this litigation could so alter its course that the measurable difference in pre-trial advantages may be arguably very slight at the time the case comes to trial.

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[2] See footnote 11 to Opinion of Pennsylvania Supreme Court; Steinberg Petition, page 17.

[3] See footnote 28 to Opinion of Pennsylvania Supreme Court; Steinberg Petition, page 31.

CONCLUSION.

For the foregoing reasons, respondent respectfully submits that the Petitions should be denied.

Respectfully submitted,

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